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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

PUBLIC CITIZEN,
Petitioner,

v.

CLERK, U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Article I, section 7, clause 2 of the United States Constitution requires that, before a bill can become a law, it must first be passed in identical form by both Houses of Congress. With respect to the Deficit Reduction Act of 2005, ("DRA"), the House of Representatives never passed the version of the DRA that was enrolled and sent to the President for his signature. Therefore, the bicameralism requirement was not met. The question presented is:

> Whether this Court's decision in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), precludes the federal courts from considering a challenge to the validity of the DRA on the ground that it was enacted in violation of the bicameralism requirement.

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Some constitutional provisions are open to interpretation. One constitutional requirement that is not ambiguous, however, is the requirement that every bill pass both houses of Congress before it can be presented to the President and become law. The Deficit Reduction Act of 2005 ("DRA") was presented to the President in violation of that requirement: The Senate passed one version of a bill, the House another, and then the Senate's version was presented to the President, who signed it. Under the Constitution, that bill has not become a law.

Notwithstanding the straightforward constitutional requirement of bicameralism, the court below affirmed the dismissal of Public Citizen's claim that the DRA is invalid under the United States Constitution. The court held that *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), established an "enrolled bill rule" that required dismissal of the constitutional challenge. According to the court, under that rule, the courts must conclusively presume that signed legislation was enacted in accordance with article I, section 7, clause 2, and may not consider any evidence to the contrary. Yet if that were so, then the bicameralism "requirement," although central to the legislative process established by the Constitution, would be merely advisory. Moreover, the court's broad reading of *Marshall Field* is divorced from the context and substance of the decision itself and from the authoritative limiting construction placed on it by this Court's more recent decision, *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 486 F.3d 1342 (D.C. Cir. 2007), and is reproduced in the appendix at Pet. App. 1a. The district court's August 11, 2006, Memorandum Opinion granting Respondent's motion to dismiss is reported at 451 F. Supp. 2d 109 (D.D.C. 2006), and is reproduced in the appendix at Pet. App. 25a.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 7, clause 2 of the United States Constitution states:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States.

1 U.S.C. § 106 states, in relevant part:

> Every bill or joint resolution in each House of Congress shall, when such bill or resolution passes either House, be printed, and such printed copy shall be called the engrossed bill or resolution as the case may be. Said engrossed bill or resolution shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and in that form shall be dealt with by that House and its officers, and, if passed, returned signed by said Clerk or Secretary. When such bill, or joint resolution shall have passed both Houses, it shall be printed and shall then be called the enrolled bill, or joint resolution, as the case may be, and shall be signed by the presiding officers of both Houses and sent to the President of the United States.

Excerpts of the Deficit Reduction Act of 2005, Pub. L. No. 109-171,120 Stat. 4 (2006), are included in the Appendix beginning on page 65a.

STATEMENT OF THE CASE

This case concerns a substantive discrepancy between House and Senate bills that arose during the process of preparing a bill for transmission from the Senate to the House and, later, to the President. Because an explanation of the factual background involves some terminology specific to the legislative process, Part A below provides a brief description of that process. Part B describes the facts underlying the lawsuit, and Part C provides a summary of the proceedings below.

A. The Legislative Process

Although the Constitution does not spell out procedures for complying with article I, section 7's bicameralism requirement, Congress has enacted a statute specifying such procedures, 1 U.S.C. § 106. First adopted in 1893, the year after *Marshall Field* was decided, section 106 provides that, after one chamber of Congress passes a bill, the bill is to be printed and signed by the Clerk of the House or the Secretary of the Senate (depending on which chamber passed the bill). The printed version of the bill passed by a single chamber is called the "engrossed bill." 1 U.S.C. § 106. The engrossed bill is sent to the other chamber and "in that form shall be dealt with by that House and its officers." *Id.* If the other chamber passes the engrossed bill without amendment, the Clerk or Secretary of that chamber signs the bill and returns it to the originating chamber. *Id.* The engrossed bill is then reprinted and, at that point, is called the "enrolled bill." *Id.* The presiding officers of the House and the Senate each sign the enrolled bill to attest that it passed each chamber. *Id.* The enrolled bill is then sent to the President. *Id.*

Pursuant to statute, an official copy of the precise text of each engrossed bill is printed by the Government Printing

Office ("GPO"). *See* 44 U.S.C. § 706 (enacted 1968). That official version is readily available from GPO:

> The information provided on [GPO's website, known as GPO Access] is the official, published version and the information retrieved from GPO Access can be used without restriction, unless specifically noted. This free service is funded by the Federal Depository Library Program and has grown out of Public Law 103-40, known as the Government Printing Office Electronic Information Enhancement Act of 1993.

GPO, *About GPO Access*, www.gpoaccess.gov/about/gpoaccess.html.

B. The Deficit Reduction Act Of 2005

In the fall of 2005, the House and Senate passed different versions of S. 1932, a budget bill referred to as the Deficit Reduction Act of 2005 or DRA. To reconcile the differences between the House and Senate bills, the legislation was sent to a House-Senate conference committee. The bill was modified in conference, and the final conference report was submitted to the House and Senate for their votes. *See* H.R. Conf. Rep. No. 109-362 (2005), *reprinted in* 151 Cong. Rec. H12641 *et seq.* (Dec. 18, 2005).

On December 19, 20, and 21, 2005, the Senate considered the conference report. Four points of order were raised against the report, and three were sustained on the ground that the provisions of the conference report that they challenged violated the rules of the congressional budget process. 151 Cong. Rec. S14203-04 (Dec. 21, 2005).[1] As a result, the conference report

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[1]A point of order is "[a] claim made by a Senator from the (continued...)

did not pass the Senate. *Id.* at S14205. Instead, on December 21, the Senate voted on an amended version of S. 1932 that omitted the items that gave rise to the points of order. *Id.* at S14337-86. The amended bill passed 51 to 50, with Vice President Cheney casting the tie-breaking vote. *Id.* at S14221; *see also id.* at H13178 (Dec. 22, 2005) (message from Senate clerk to House).

When engrossing the amended bill for transmittal to the House, a Senate clerk made a substantive change to section 5101(a)(1). In two places, the clerk altered the duration of Medicare payments for certain durable medical equipment, stated as 13 months in the version passed by the Senate, to 36 months. *Compare* 151 Cong. Rec. S14337, S14346 (Dec. 21, 2005) (version passed by Senate), *with* S. 1932, engrossed in Senate (Dec. 21, 2005) (D.C. Cir. JA 55-62).[2] The budget impact of the change is $2 billion over five years. Pet. App. 29a n.7.

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[1](...continued)
floor that a rule of the Senate is being violated. If the Chair sustains the point of order, the action in violation of the rule is not permitted." U.S. Senate, *Senate Glossary*, www.senate.gov/reference/glossary_term/point_of_order.htm. In this case, the points of order were based on the "Byrd rule," under which "any provisions in a final budget reconciliation bill that are extraneous to changing the budget can be stricken." 151 Cong. Rec. S14204.

[2]S. 1932 as engrossed in the Senate on December 21, 2005, is available in full from the Government Printing Office at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s1932eas.txt.pdf. The discrepancy appears twice in section 5101(a)(1).

Errors in engrossed bills have occurred before. The proper procedure is for the chamber that made the error to send a message to the other chamber requesting return of the bill, so that the error can be corrected. *See* 109th House Rules and Manual, House Doc. No. 108-241, § 565 at 296-97 (2005) (listing examples), *available at* www.gpoaccess.gov/hrm/browse_109.html. That procedure was not followed here. Rather, on February 1, 2006, the House voted on the engrossed version of S. 1932, which contained the clerk's error and, therefore, was not identical to the version of the bill passed by the Senate. *See* S. 1932, engrossed in Senate (full citation *supra* note 2); 152 Cong. Rec. H69, H77 (Feb. 1, 2006). The House passed S. 1932, with the 36-month provision, by a vote of 216 to 214. 152 Cong. Rec. H68.[3]

Because the legislation originated in the Senate, the House returned the legislation to the Senate for enrollment and transmission to the President for his signature. *See* 152 Cong. Rec. S443 (Feb. 1, 2006) (message from House to Senate announcing that House agreed to Senate amendment to S. 1932). When enrolling the bill, a Senate clerk again changed the provision in section 5101(a)(1), from 36 months, as stated in the engrossed bill and passed by the House, back to 13 months, as earlier approved by the Senate. *See* S. 1932, enrolled in Senate, at § 5101 (App. 44-49).[4]

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[3]The Congressional Record provides authoritative evidence of the vote on and passage of bills. *See, e.g., Smith v. City of Jackson*, 544 U.S. 228, 232 n.2 (2005); *McCreary Cty. of Ky. v. ACLU*, 545 U.S. 844, 889 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

[4]A link to the enrolled bill is available online from the GPO

(continued...)

The enrolled bill was signed by the Speaker of the House and President pro tempore of the Senate on February 7, 2006, and transmitted to the President later that day. 152 Cong. Rec. S768 (Feb. 7, 2006). The House, however, had never passed that version of the bill; indeed, the House had never been sent that version for consideration.

On February 8, 2006, President Bush signed the enrolled bill. D.C. Cir. JA 113; *see* DRA, Pub. L. No. 109-171, 120 Stat. 4 (2006).

C. Proceedings Below

Since February 6, 2005, the fee for instituting a civil action in the United States district courts has been $250. 28 U.S.C. § 1914(a). Section 10001 of the DRA purports to increase the fee to $350, effective April 9, 2006. *See* DRA § 10001(a). This provision injures Public Citizen, which has paid a fee to file a civil case in the district court every year since at least 1976, *id.* at 38, and will continue to file cases in the district court. Complaint ¶ 5.

Public Citizen brought this action on March 21, 2006, alleging that the DRA is invalid because the means by which it was purportedly enacted violates the bicameralism requirement of the Constitution. The complaint requested declaratory relief and an order directing the district court clerk to accept $250 as the filing fee for civil cases, in accordance with 28 U.S.C. § 1914(a).

Public Citizen promptly moved for summary judgment, and the district court clerk, represented by the Department of

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[4](...continued)
at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid= f:s1932enr.txt.pdf.

Justice, opposed that motion and moved to dismiss the case. On August 11, 2006, the district court issued an order and opinion denying Public Citizen's motion for summary judgment and granting the clerk's motion to dismiss. The court found that, under *Marshall Field*, it could not look past the enrolled bill to determine whether the DRA had been enacted in accordance with the Constitution. Pet. App. 38a-39a.

The court of appeals affirmed. *Id.* at 3a. The court first addressed a standing argument made in the district court by amicus CTIA - The Wireless Association and then embraced by the clerk in the court of appeals.[5] The court held that "the *Marshall Field* rule is . . . a non-merits threshold ground for

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[5]The government argued that Public Citizen lacks standing because section 5101(a)—the provision as to which the House passed a version substantively different from that signed by the President—is severable from the rest of the DRA, and, therefore, Public Citizen has not been harmed by the fact that the House did not pass the version of the bill signed by the President. However, severability is a consideration only when a particular provision of an otherwise validly enacted law is unconstitutional because "[t]he unconstitutionality of *a part* of an act does not necessarily defeat or affect the validity of its remaining provisions." *Champlin Ref. Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932) (emphasis added); *see Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (discussing severability of an "unconstitutional provision" from "unobjectionable provisions"); *United States v. Jackson*, 390 U.S. 570, 585 (1968) (quoting *Champlin*). Thus, where part of a statute is unconstitutional, "the invalid *part* may be dropped if what is left is fully operative as law." *Champlin*, 286 U.S. at 234 (emphasis added). In this case, the constitutional problem is not that a specific provision of the DRA is unconstitutional. Rather, the *entire* DRA is not law because it was not enacted according to the requirements of the Constitution.

dismissal," *id.* at 12a, and thus could be considered prior to the standing question. It then turned to the "enrolled bill rule" and held that it was barred by *Marshall Field* from considering evidence that the House had not passed the version of the DRA signed by the President. *Id.* at 15a.

In addition to Public Citizen, several other plaintiffs filed cases challenging the validity of the DRA. Those cases were also dismissed on the theory that *Marshall Field* precludes judicial review of the evidence. *See OneSimpleLoan v. Secretary of Educ.*, 2007 WL 2050852 (2d Cir. 2007); *Zeigler v. Gonzales*, 2007 WL 1875945 (S.D. Ala. 2007); *Conyers v. Bush*, 2006 WL 3834224 (E.D. Mich. 2006).

REASONS FOR GRANTING THE WRIT

There is no serious question that enactment of the DRA violated the bicameralism requirement of article I, section 7, clause 2 because the House did not approve the version of S. 1932 presented to and signed by the President. (And at this stage of the case, the facts pleaded in the complaint are taken as true. Pet. App. 4a-5a.) Rather, the question is whether, in the face of indisputable evidence proving a constitutional violation, the judiciary must turn a blind eye and permit enforcement of a bill that the Constitution does not recognize as law. The Court should grant the petition to address this important constitutional question.

I. The Decision Below Renders The Constitution's Bicameralism Requirement Unenforceable.

The United States Constitution provides: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States . . . ." U.S. Const., art. I, § 7, cl. 2. Pursuant to this bicameralism requirement, a bill must be passed in

identical form by both chambers before it can become a law. *See Clinton v. City of New York*, 524 U.S. 417, 448 (1998) ("The Constitution explicitly requires that each of . . . three steps be taken before a bill may 'become a law'": a bill containing the "exact text" must be approved by one house; the other house must approve "precisely the same text," and "that text" must be signed by the President) (quoting art. I, § 7); *City of New York v. Clinton*, 985 F. Supp. 168, 178 (D.D.C.) ("At the heart of the notion of bicameralism is the requirement that any bill must be passed by both Houses of Congress in exactly the same form."), *aff'd*, 524 U.S. 417 (1998); Parliamentarian, U.S. House of Reps., *How Our Laws Are Made* XVII (June 30, 2003) (bill must be "agreed to in identical form by both bodies" before presentation to the President); *see also West Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98-99 (1991) (statutory purpose determined by "statutory text adopted by both Houses of Congress and submitted to the President"). If any provision of the text of a bill voted on in one house differs from the text voted on in the other or from the version signed by the President, the law has not been validly enacted. *Clinton*, 524 U.S. at 448.

The requirement that a bill pass both chambers of Congress before being presented to the President is not a mere formality but rather "serve[s] essential constitutional functions." *INS v. Chadha*, 462 U.S. 919, 951 (1983). "By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials." *Chadha*, 462 U.S. at 948-49. Indeed, "[Alexander] Hamilton argued that a Congress comprised of a single House was antithetical to the very purposes of the Constitution," for to adopt a unicameral

legislature would be to confer on a single body "'all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived.'" *Id.* at 949 (quoting The Federalist No. 22, at 135 (H. Lodge ed. 1888)). Bicameralism is a central part of the system of checks and balances erected "to protect the people from the improvident exercise of power." *Id.* at 957.

In this case, although the version of the DRA that was presented to and signed by the President never passed the House of Representatives, the court refused to look beyond the enrolled bill to determine the validity of the enactment. The court of appeals' conclusive presumption that the enrolled bill, once signed, was constitutionally enacted renders the bicameralism requirement unenforceable. It transforms the requirement that both chambers of Congress agree on a piece of legislation into a requirement that the *presiding officers* of the chambers agree on the legislation, whether or not a majority of the members of their chambers would support their position if a vote were held. It raises "form over substance, fact over fiction, and amount[s] to government by clerical error." *Association of Tex. Prof. Educators v. Kirby*, 788 S.W.2d 827, 830 (Tex. 1990) (recognizing exception to state's enrolled bill rule).

Without this Court's intervention, article I, section 7, clause 2 will be rendered advisory. Congressional leaders will be free to ignore differences between House and Senate bills, whether those differences are purposeful or inadvertent, by enrolling the version they personally prefer. The Court should grant this petition to confirm that all enacted legislation must satisfy the Constitution's bicameralism requirement.

II. The Decision Below Is Not Required By *Marshall Field* And Is Inconsistent With This Court's Decision In *Munoz-Flores*.

The court below accepted the argument that—no matter the evidence showing that the House did not pass the bill presented to the President—courts are precluded from considering any evidence aside from the enrolled bill signed by the Speaker of the House and President pro tempore of the Senate. Pet. App. 15a. That conclusion was based entirely on *Marshall Field*. *Id.* However, *Marshall Field* does not bar courts from considering the evidence presented here, and this Court in *Munoz-Flores* rejected the mechanical reading of *Marshall Field* adopted by the court below.

A. *Marshall Field* Does Not Preclude Judicial Consideration Of Evidence Of Bicameralism Violations.

In *Marshall Field*, the plaintiffs alleged that the Tariff Act of October 1, 1890, was not enacted in accordance with the Constitution because, according to the legislative journals, the enrolled bill presented to the President omitted a section that was included in the bill passed by both Houses. The Court held that the journals could not be used to challenge the validity of a statute. However, in dicta going beyond what was necessary to decide the case, the Court stated that when an enrolled bill has been signed by the Speaker of the House and the President of the Senate attesting to its passage and then signed by the President, "its authentication as a bill that has passed congress should be deemed complete and unimpeachable." 143 U.S. at 673. To reconcile this dicta with the courts' "duty to review the constitutionality of congressional enactments," *Munoz-Flores*, 495 U.S. at 391, the statement must be considered in context as an explanation of why, as between an enrolled bill signed by the

Speaker of the House and the President of the Senate, on the one hand, and information gleaned from congressional journals, on the other, the Court in 1892 would credit the enrolled bill.

The argument of the *Marshall Field* plaintiffs turned on the significance of journals: "The clause of the constitution upon which the [plaintiffs] rest[ed] their contention that the act in question was never passed by congress is the one declaring that 'each house shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy.'" *Marshall Field*, 143 U.S. at 670 (quoting art. I, § 5). The plaintiffs argued that "the object of [article I, section 5] was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by two houses of congress." *Id.*; *see also id.* at 672 ("[T]he contention is that it cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and signed by the president."). Journals were so central to the case that the United States attached to its brief an appendix containing a list of state authorities addressing the question whether legislative journals could be used to impeach an enrolled act. *Id.* at 661-66 (reproducing list).

The Court fully agreed that "a bill signed by the speaker of the house of representatives and by the president of the senate, presented to and approved by the president of the United States, . . . does not become a law of the United States if it ha[s] not in fact been passed by congress." *Id.* at 669. "In view of the express requirements of the constitution, the correctness of this general principle cannot be doubted." *Id.* Moreover, the Court expressly recognized that the Speaker of the House and the President of the Senate have no authority to attest by their signatures to any bill not passed by each house, and likewise

that the President has no authority to approve a bill not passed by Congress. *Id.*

Nonetheless, the Court rejected the plaintiffs' article I, section 5 argument, holding instead that the keeping of the journals, although required by the Constitution, is not a requirement tied to the valid passage of a bill. Moreover, the Court noted that the Constitution does not prescribe the content of the journals, but rather left those details to the discretion of Congress. *Id.* at 671. And to explain the "evils" that would result "from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them," *id.* at 673, the Court quoted extensively from cases decrying the "danger" of "intentional corruption" of the journals, the concern of putting every law "at the mercy of all persons having access to these journals," the "mischiefs absolutely intolerable" of allowing a law to be "impeached by the journals," and the likelihood of errors in journals "made amid the confusion of the dispatch of business." *Id.* at 674-77. For all of these reasons, the Court held that the journals could not be used to determine whether the enrolled bill signed by the President was the same bill passed by Congress.

After its extended discussion of the unreliability of journals, the Court concluded:

> We are of the opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either house, from the reports of committees, or from other documents printed by authority of congress, that the enrolled bill, designated 'H. R. 9416,' as finally passed, contained a section that does not

> appear in the enrolled act in the custody of the state department.

Id. at 680. The court of appeals below read that sentence broadly to mean that courts could look at no evidence aside from the enrolled bill. Pet. App. 16a. However, the sentence need not be read so broadly; and, in the context of the opinion as a whole, it makes little sense to do so. Aside from one paragraph discussing the congressional leaders' signatures attesting to the passage of a bill and the respect due to Congress, 143 U.S. at 672, the "reasons stated" focus exclusively on journals and their shortcomings. Moreover, the Court's conclusion is specific to "the appellants" before it. In light of the lengthy discussion of journals that precedes the Court's conclusion, and given the Court's statement that the plaintiffs' contention that the Tariff Act of 1890 never passed Congress "rest[ed]" on the Journal Clause, a broad reading of the one sentence conclusion is unwarranted.[6]

In addition, in 1890, "[n]o provision of law exist[ed] for recording or filing in any office, as a public record, the bills introduced into Congress, the bills as they [were] reported from either House, or the bills as they [were] reported by committees. There [was] no appropriation for their publication by Congress,

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[6]To be sure, the *Marshall Field* plaintiffs presented exhibits in addition to the journals. However, the opinion makes clear that the plaintiffs' ability to prove their case turned on their argument about the significance of journal entries. The plaintiffs' claim was that a section that was included in the conference report passed by both Houses was omitted from the enrolled bill. The conference report was printed in the journals, which were offered as evidence of the report. *See, e.g.*, Reply Br. of Appellants in *Marshall Field*, No. 1052, at 50-51 (making this point and directing Court to an appendix to the government's brief that reproduced relevant journal entries).

and there [was] no way of proving their contents except by oral evidence." Br. for U.S. in *Marshall Field*, No. 1052, at 31 (filed Oct. 24, 1891). In 1893, however, the current procedure for engrossing and printing bills was adopted as a concurrent resolution; in 1947, it was enacted into law as 1 U.S.C. § 106. Section 106 requires that, after one house passes a bill, the bill must "be printed, and such printed copy shall be called the engrossed bill." The engrossed bill "shall be sent to the other House, and in that form shall be dealt with by that House and its officers." *See also* 44 U.S.C. § 706 (providing for GPO printing of each Senate and House bill).

Thus, whereas in 1890 engrossed bills had no official status, today they are defined and required by statute and constitute a formal, public part of the legislative process. The "nature of the evidence" in this case is, therefore, different from that in *Marshall Field*, and, accordingly, the outcome of *Marshall Field* should not dictate the outcome here.

B. *Munoz-Flores* Confirms That *Marshall Field* Does Not Preclude Challenges To Legislation Based On Violations Of The Constitution's Procedural Requirements.

Whereas *Marshall Field* is, first and foremost, a case about article I, section 5's journal requirement, this case does not concern journals at all. The only constitutional requirement on which Public Citizen "rest[s] [its] contention," *Marshall Field*, 143 U.S. at 670, is the bicameralism requirement of article I, section 7, clause 2.

This difference is critical. In *Munoz-Flores*, the Court rejected an argument, based on *Marshall Field*, that Congress's designation of a revenue bill as "H.J. Res." precluded judicial review of the issue whether the bill had in fact originated in the Senate. 495 U.S. at 391 n.4 (responding to concurrence at 408-

09). Although *Munoz-Flores* recognized that the "H.R." designation on an enrolled bill could be taken to mean that "Congress explicitly determined" that the bill had originated in the House, as is constitutionally required of revenue bills under article I, section 7, clause 1, the Court stated that "congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality." 495 U.S. at 391.

The court below read *Marshall Field* to mean that courts must, without exception, assume that all bills signed by the presiding congressional officers and presented to the President satisfy article I, section 7, clause 2. *Munoz-Flores* belies that reading. It says that courts must assume the validity of bills authenticated in that manner only "[i]n the absence of any constitutional requirement binding Congress." *Id.* at 391 n.4. Here, a constitutional requirement binding Congress is directly before the Court—article I, section 7, clause 2.

Although *Munoz-Flores* uses the phrase a "requirement binding Congress" to distinguish cases in which courts must "accept as passed all bills authenticated in the manner provided by Congress" and cases in which "[*Marshall*] *Field* does not apply," this Court of course knew that the Journal Clause itself imposes a "requirement binding Congress"—it requires each house of Congress to maintain a journal. Therefore, the phrase a "requirement binding Congress" must refer to a requirement binding Congress with respect to the matter at issue—the valid enactment of a law. *See Board of Comm'rs v. W.N. Coler & Co.*, 180 U.S. 506, 524 (1901) (distinguishing *Marshall Field* from a case challenging a law's validity based on items required to be entered on journals but omitted); *Harwood v. Wentworth*, 162 U.S. 547, 562 (1896) (Arizona statute not impeachable by journals where Arizona law did not require journals to reflect necessary facts).

In *Munoz-Flores*, the constitutional provision at issue was the Origination Clause, article I, section 7, clause 1, which, unlike the Journal Clause, imposes a requirement with respect to the valid enactment of certain laws. In this regard, clause 1 and clause 2 are indistinguishable. Neither the government nor the courts below offered a reading of *Munoz-Flores* that sensibly would allow the courts to consider clause 1 challenges but not clause 2 challenges.[7]

The district court recognized that allowing claims based on article I, section 7, clause 1 violations to go forward, but not claims based on article I, section 7, clause 2 violations "is not entirely satisfying." Pet. App. 52a; *see also OneSimpleLoan*, 2007 WL at *9 n.7 ("[W]e do agree with plaintiffs that the Supreme Court has been less than clear in explaining why courts may probe congressional documents when adjudicating some types of constitutional claims but not others."). And the court of appeals said that the relevant passage of *Munoz-Flores* "def[ies] easy comprehension." Pet. App. at 21a. Nonetheless,

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[7]The court of appeals stated that this Court "recently reaffirmed *Marshall Field*" in *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 455 n.7 (1993). Pet App. 18a. *National Bank of Oregon* did nothing of the sort. The footnote cited by the court of appeals states that a law consists of an "enrolled bill" signed by the Speaker of the House and the President of the Senate, and then cites (as "see also") 1 U.S.C. § 106. It does not address the relationship between § 106 and a "enrolled bill rule." Indeed, the opinion does not discuss the "enrolled bill rule." It only states (accurately) that *Marshall Field* concerned the "'nature of the evidence' the Court [may] consider" to determine whether a bill has passed Congress, 508 U.S. at 455 n.7 (quoting *Marshall Field*) (brackets in original), and then explains that the case before it concerns not whether a bill passed Congress, but the meaning of the bill that was passed. *Id.*

the courts found that this outcome "is the only reading [of *Munoz-Flores*] that is consistent with *Marshall Field*." *Id.* at 52a. There is another reading, however, that shows the two cases to be consistent: If the holding in *Marshall Field* is read in context, with its sharp focus on legislative journals, and in light of the fact that no law at that time established a procedure for printing bills, *Munoz-Flores* does not reveal an "unsatisfying" distinction between claims based on clause 2 violations and claims based on clause 1 violations. To the contrary, under our reading, the distinction is between constitutional requirements that concern the valid enactment of law (*e.g.*, the origination requirement and, critically here, the bicameralism requirement) and constitutional requirements that do not (*e.g.*, the journal requirement). *See, e.g., W.N. Coler*, 180 U.S. at 524.

In sum, in light of 1 U.S.C. § 106 and the nature of the evidence here, Petitioner's position honors both the Constitution's requirements and Congress's interests in avoiding mischief in the engrossing and enrolling process. The decision below honors neither.

III. If *Marshall Field* Establishes A Conclusive Presumption In Favor Of The Validity Of Enrolled Bills, It Should Be Overruled.

If the Court agrees with the holding below that *Marshall Field* dictates dismissal of this case, the Court should overrule *Marshall Field*. The concerns behind that decision, *see supra* p. 14, are of far less significance today, given the passage of § 106 and advances in technology over the past century. *See also OneSimpleLoan*, 2007 WL *1 ("[A]bsent Supreme Court direction, we may not reassess the need for an enrolled bill rule or create exceptions to that rule on the basis of technological or political developments since *Marshall Field* was decided.").

Moreover, today, "the tendency is in favor of [a] rule leaving only a prima facie presumption of validity which may be attacked by any authoritative source of information." 1 Singer, *Statutes and Statutory Construction* § 15.2, at 816-18 (6th ed. 2002) ("*Sutherland*"). As *Sutherland* notes, conclusive presumptions, such as that embodied in an enrolled bill rule, "are capable of producing results that do not accord with fact. . . . 'Courts applying such a rule are bound to hold statutes valid which they and everybody know were never legally enacted.'" *Id.* at 821-22 (quoting *Bull v. King*, 286 N.W. 311 (Minn. 1939)); *see OneSimpleLoan*, 2007 WL at *10 ("Whether the enrolled bill rule has come to serve as an incentive for politicians to avoid the rigors of constitutional law-making is a different question," the answer to which "might provide a policy argument against strict application of the enrolled bill rule.").

Thus, for example, Pennsylvania, which previously afforded enrolled bills a conclusive presumption of validity, no longer does so when the facts are undisputed and the issue is whether a mandatory constitutional provision has been violated. *See Consumer Party of Pa. v. Commonwealth of Pa.*, 507 A.2d 323, 334 (Pa. 1986). Likewise, Kentucky followed an enrolled bill rule beginning in 1896, *see Lefferty v. Huffman*, 35 S.W. 123, 126 (Ky. 1896), but more recently discarded it, adopting an approach under which the "prima facie presumption that an enrolled bill is valid" may be "overcome by clear, satisfactory and convincing evidence that constitutional requirements have not been met." *D&W Auto Supply v. Department of Revenue*, 602 S.W.2d 420, 425 (Ky. 1980); *see also Association of Tex. Prof. Educators*, 788 S.W.2d at 830 (relaxing rule to allow consideration of journals when presiding officers and attorney general stipulate that enrolled bill was not passed by legislature).

None of the factors that normally make adherence to precedent desirable are present here, and thus stare decisis should not prevent this Court from overruling *Marshall Field*. As both the district court and the court of appeals noted, the notion that *Marshall Field* establishes an absolute shield against bicameralism challenges is drawn into question by *Munoz-Flores*. Pet. App. 21a, 52a; *see Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2721 (2007) ("[W]e have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings.") (citation omitted). An enrolled bill rule has neither become "embedded" in our "national culture," *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000), nor often been followed by this Court. *See Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007) (overruling precedent that Court had not followed for 40 years). In addition, although "concerns about maintaining settled law are strong when the question is one of statutory interpretation," *Leegin*, 127 S. Ct. at 2720, *Marshall Field* does not implicate that concern. Moreover, 1 U.S.C. § 106 and 44 U.S.C. § 706 undermine a critical factual point underlying *Marshall Field*: that no law governs the process of engrossing or printing a bill. *See Randall v. Sorrell*, 126 S. Ct. 2479, 2489-90 (2006) (declining to overrule case where changed circumstances do not "undermine [its] critical factual assumptions").

Although reliance on a judicial opinion can in some cases be a significant reason to adhere to it, *see Leegin*, 127 S. Ct. at 2724, Congress cannot have relied on *Marshall Field* to enact the DRA without passage by the House because that opinion and subsequent cases, *see supra* pp. 9-10, confirm the substantive requirement that identical legislation must be passed by both houses of Congress before the legislation can be presented to the President. In any event, the violation appears to have been unintentional. And an intentional violation of the

bicameralism requirement, executed in reliance on the view that *Marshall Field* would protect the DRA from judicial scrutiny, would, like any intentional violation of the Constitution, lack good faith. It therefore would provide no basis for refusing to overrule *Marshall Field.*

Finally, notwithstanding the concern expressed in *Marshall Field* that allowing consideration of evidence aside from the enrolled bill would lead to "uncertainty" and "mischief," various states have for decades allowed consideration of evidence aside from the enrolled bill, with no indication of difficulty. *See, e.g., State ex rel. Maloney v. McCartney*, 223 S.E.2d 607, 615 (W. Va. 1976) (presumption of validity accorded an enrolled bill may be "overcome by clear and convincing proof"), and *Charleston Nat'l Bank v. Fox*, 194 S.E. 4, 7 (W. Va. 1937) (citing *Osborn v. Staley*, 5 W. Va. 85 (1871)); *State ex rel. Sorlie v. Steen*, 212 N.W. 843, 845 (N.D. 1927) ("[T]he courts may go behind the enrolled bill and inquire into the legislative records to determine whether or not constitutional requirements have been observed.") (relying on *State v. Schultz*, 174 N.W. 81 (N.D. 1919)); *Ford v. Plum Bayou Rd. Improvement Dist.*, 258 S.W. 613, 614 (Ark. 1924) (correctness of enrolled bill may be overcome by "clear and decisive" proof); *Ridgely v. Mayor & City Council of Balt.*, 87 A. 909, 915 (Md. 1913) (presumption arising from proper authentication may be rebutted by clear and satisfactory evidence, "such as that furnished by the engrossed bills") (citing *Berry v. Drum Point R.R. Co.*, 41 Md. 463 (1875)). Any concern about disruption or mischief is contradicted by the small number of reported cases in these jurisdictions. The experience of these states thus undermines a key assumption underpinning the holding in *Marshall Field* and further illustrates that overruling the decision is now appropriate.

Accordingly, to the extent that the Court construes *Marshall Field* to establish a conclusive presumption in favor of the validity of enrolled bills, the Court should grant the petition and overrule *Marshall Field*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued Feb. 9, 2007 Decided May 29, 2007

No. 06-5232

PUBLIC CITIZEN,
Appellant
v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,
Appellee.

Appeal from the United States District Court
for the District of Columbia
(No. 06cv00523).

Before: TATEL and GARLAND, Circuit Judges, and EDWARDS, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge EDWARDS.

EDWARDS, Senior Circuit Judge. Article I of the United States Constitution requires that before proposed legislation may "become[ ] a Law," U.S. CONST. art. I, § 7, cl. 2, "(1) a bill containing its exact text [must be] approved by a majority of the Members of the House of Representatives; (2) the Senate [must] approve [ ] precisely the same text; and (3) that text [must be] signed into law by the President," *Clinton v. City of New York*, 524 U.S. 417, 448 (1998). Public Citizen, a not-for-profit consumer advocacy organization, filed suit in

District Court claiming that the Deficit Reduction Act of 2005, Pub.L. No. 109-171, 120 Stat. 4 (2006) ("DRA" or "Act"), is invalid because the bill that was presented to the President did not first pass both chambers of Congress in the exact same form. In particular, Public Citizen contends that the statute's enactment did not comport with the bicameral passage requirement of Article I, Section 7 of the Constitution, because the version of the legislation that was presented to the House contained a clerk's error with respect to one term, so the House and Senate voted on slightly different versions of the bill and the President signed the version passed by the Senate. Public Citizen asserts that it is irrelevant that the Speaker of the House and the President pro tempore of the Senate both signed a version of the proposed legislation identical to the version signed by the President. Nor does it matter, Public Citizen argues, that the congressional leaders' signatures attest that indistinguishable legislative text passed both houses.

The District Court held that Public Citizen's bicameralism claim is foreclosed by the Supreme Court's decision in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892). *See Public Citizen v. Clerk, U.S. Dist. Ct. for D.C.*, 451 F. Supp. 2d 109 (D.D.C.2006). In that case, the Court held that the judiciary must treat the attestations of "the two houses, through their presiding officers" as "conclusive evidence that [a bill] was passed by Congress." *Marshall Field*, 143 U.S. 672-73. Under *Marshall Field*, a bill signed by the leaders of the House and Senate—an attested "enrolled bill"—establishes that Congress passed the text included therein "according to the forms of the Constitution," and it "should be deemed complete and unimpeachable." *Id.* at 672-73. Recognizing that *Marshall Field*'s "enrolled bill rule" prohibited it from questioning the congressional pedigree of the bill signed by the Speaker and President pro tempore, the District Court dismissed Public

Citizen's complaint and denied its motion for summary judgment. *Public Citizen,* 451 F. Supp. 2d 109.

Public Citizen has appealed, arguing that while *Marshall Field* may prohibit the impeachment of an enrolled bill by reference to congressional journals, the decision does not bar a court from considering other evidence extrinsic to an enrolled bill. Public Citizen claims further that even if *Marshall Field* was not so restricted as originally decided, subsequent decisions of the Court have narrowed the enrolled bill rule. Appellee and CTIA—the Wireless Association ("CTIA"), appearing as *amicus curiae,* urge affirmance and contend that Public Citizen lacks standing to challenge the DRA.

We agree with the District Court that the enrolled bill rule of *Marshall Field* controls the disposition of this case. We therefore affirm the judgment of the District Court. We find it unnecessary to determine whether Public Citizen has standing to bring suit, because we conclude that the *Marshall Field* rule of dismissal "represents the sort of 'threshold question' [that] ... may be resolved before addressing jurisdiction." *Tenet v. Doe,* 544 U.S. 1, 6 n.4 (2005).

I. BACKGROUND

A. *"Engrossed Bills" and "Enrolled Bills" in the House and Senate*

Congress has established specific procedures governing passage of a bill:

> [1] Every bill ... in each House of Congress shall, when such bill ... passes either House, be printed, and such printed copy shall be called the engrossed bill ....
>
> [2] Said engrossed bill ... shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and in that form shall be dealt with by that

> House and its officers, and, if passed, returned signed by said Clerk or Secretary.
> [3] When such bill ... shall have passed both Houses, it shall be printed and shall then be called the enrolled bill, ... signed by the presiding officers of both Houses and sent to the President of the United States.

1 U.S.C. § 106. An "engrossed bill" is thus one that has passed one chamber of Congress, while an "enrolled bill" has passed both the House and the Senate.

B. *Public Citizen's Challenge to the DRA*

On February 8, 2006, President Bush signed a budget bill known as the Deficit Reduction Act of 2005. In ten titles, the DRA amends a variety of familiar statutes, including the Federal Deposit Insurance Act, the Communications Act of 1934, and the Social Security Act. The provisions of the DRA are sweeping: the Act, *inter alia,* effects extensive changes to Medicare and Medicaid laws, provides relief for victims of Hurricane Katrina, creates a program through which households may obtain coupons to defray the cost of digital-to-analog converter boxes for their televisions, and, significantly, for purposes of this law suit, amends the U.S. Code to increase the filing fee for civil actions in federal district courts from $250 to $350.

Approximately six weeks after the President signed the DRA, Public Citizen filed a complaint against the Clerk of the U.S. District Court for the District of Columbia ("Clerk"), arguing that as an organization that routinely files civil suits, it anticipated having to pay the $100 fee increase on a regular basis. Public Citizen asked the District Court to declare the Act unconstitutional and compel the Clerk to maintain the $250 filing fee.

The facts in this case are straightforward and largely undisputed. Nonetheless, on review of a motion to dismiss, we "must treat the complaint's factual allegations as true ... and must grant [Public Citizen] the benefit of all inferences that can be derived from the facts alleged." *Holy Land Found. for Relief & Dev. v. Ashcroft,* 333 F.3d 156, 165 (D.C. Cir. 2003) (internal quotation marks omitted). We will therefore recite the facts underlying the complaint as they have been presented by Public Citizen.

According to the complaint, in the Fall of 2005, the House and Senate passed different versions of a budget bill referred to as S.1932. To iron out the differences, the legislation was sent to a conference committee. The committee produced a conference report which failed to pass the Senate. Shortly thereafter the Senate passed an amended version of S.1932 wherein § 5101 specified a 13-month duration of Medicare payments for certain durable medical equipment. However, when the Senate clerk transmitted the engrossed S.1932 to the House, he mistakenly changed § 5101 of the bill to reflect a 36-month duration of payments for durable medical equipment rather than the 13-month duration actually approved by the Senate. The House voted on this engrossed bill, including the erroneous duration figure. Because the legislation originated in the Senate, the House returned it to the Senate for enrollment. The Senate clerk, recognizing the transcription error in the engrossed bill, altered the text of the enrolled bill so that it included a 13-month rather than a 36-month duration. The version of the DRA signed by the presiding officers contains the 13-month figure. Thus, since the 13-month duration term in the enrolled bill passed the Senate but not the House, the President signed legislation that did not actually pass both houses of Congress in precisely the same form.

After filing its complaint, Public Citizen moved for summary judgment. The Clerk lodged a motion to dismiss the

case under Federal Rule of Civil Procedure 12(b)(6). The District Court denied Public Citizen's motion and granted dismissal, concluding that even if it accepted Public Citizen's allegations as true, the bicameralism challenge still "must fail" under the enrolled bill rule of *Marshall Field. Public Citizen,* 451 F. Supp. 2d at 128. Public Citizen now appeals the dismissal of its complaint and denial of its motion for summary judgment.

II. ANALYSIS

A. *Standard of Review*

The District Court dismissed Public Citizen's complaint for failure to state a claim upon which relief may be granted, *see* FED. R. CIV. P. 12(b)(6), and denied its motion for summary judgment, *see* FED. R. CIV. P. 56. A dismissal for failure to state a claim under Rule 12(b)(6) is reviewed *de novo*—meaning that this court applies the same decisional principles as the District Courts. *See, e.g., Kingman Park Civic Ass'n v. Williams,* 348 F.3d 1033, 1039-40 (D.C.Cir. 2003). A denial of a motion for summary judgment typically is not a final order, so it is ordinarily not appealable. *See, e.g., Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290, 296 (D.C. Cir. 2006). However, an order denying a motion for summary judgment may be reviewed on appeal "where it is accompanied by a final order disposing of all issues before the district court." *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.,* 973 F.2d 688, 694 n.2 (9th Cir. 1992). We review a denial of summary judgment *de novo.* "The test to be applied in reviewing the grant or denial of a summary judgment motion is that summary judgment is proper only when there is no genuine issue of any material fact or when viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law." *Pomerantz v.*

County of Los Angeles, 674 F.2d 1288, 1290 (9th Cir. 1982) (internal quotation marks omitted).

B. *Standing and Other Threshold Issues*

The Clerk and CTIA contend that Public Citizen cannot meet the irreducible constitutional minimum of standing. Appellee's Br. at 30-32; Br. of Amicus Curiae at 19-27; *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (describing Article III standing requirements). In particular, CTIA argues that, "in addition to requiring injury-in-fact and causation, Article III obliges the plaintiff to establish that the alleged injury is judicially redressable. Because the putatively unconstitutional provision of the DRA can be severed from the concededly valid remainder of the Act, Public Citizen's grievance concerning increased filing fees simply would not be redressed by a favorable decision in this appeal." Br. of Amicus Curiae at 4 (citation omitted). The Clerk concurs in this view, Appellee's Br. at 30, but argues in the alternative that we may affirm without addressing standing, because *Marshall Field* erects a threshold barrier to judicial inquiry, *id.* at 30 n.7. We agree that we may affirm without reaching the issue of standing.

In *Steel Co. v. Citizens for a Better Environment*, the Supreme Court held "that Article III jurisdiction is always an antecedent question" to be answered prior to any merits inquiry. 523 U.S. 83, 101 (1998). The Court emphasized that in order to dismiss a claim for failure "to state a cause of action" a court must have "*power* to adjudicate the case." *Id.* at 89. Therefore, such a dismissal cannot be issued "before resolving a dispute" concerning jurisdiction. *Id.* at 92. The Court noted, however, that in some cases involving "extraordinary procedural postures," *id.* at 98, federal courts have permissibly resolved the merits of a dispute without first addressing an outstanding jurisdictional question, *see id.* at 98-101. The Court

added that some of these cases "must be acknowledged to have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question." *Id.* at 101; *see also id.* at 110-11 ("[T]he Court's opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in reserv[ing] difficult questions of ... jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.") (O'Connor, J., concurring) (internal quotation marks and citation omitted).

Further diluting the "purity of the rule that Article III jurisdiction is always an antecedent question," the Court in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), observed that

> [w]hile *Steel Co.* reasoned that subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues. "[A] court that dismisses on ... non-merits grounds such as ... personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying ... *Steel Company.*" It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits. Thus, as the Court observed in *Steel Co.*, district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction, or abstain ... without deciding whether the parties present a case or controversy....

Id. at 584-85 (internal citations omitted); *see also Seale v. INS*, 323 F.3d 150, 155 (1st Cir. 2003) ("Despite sweeping language ... *Steel Co.* does not, in all instances, create an absolute rule against bypassing questions of a jurisdictional nature .").

Doubts about *Steel Co.*'s reach were significantly quelled in *Tenet* when the Court held that a federal court is not obliged to decide jurisdictional issues before certain nonjurisdictional "rule[s] designed not merely to defeat the asserted claims, but to preclude judicial inquiry." *Tenet,* 544 U.S. at 6 n.4. In *Tenet,* the Court held that the *Totten v. United States,* 92 U.S. 105 (1875), rule of dismissal may be addressed before finding jurisdiction. *Tenet,* 544 U.S. at 6 n.4. *Totten* involved a suit brought by "a self-styled Civil War spy [against] ... the United States to enforce its obligations under their secret espionage agreement." *Id.* at 3. The Court concluded that "public policy forb[ids]" such a suit, *id.,* since "[e]ven a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to close up like a clam," *id.* at 11 (internal quotation marks omitted). When two alleged Cold War spies brought a similar suit, the *Tenet* Court held that "the *Totten* rule of dismissal ... represents the sort of 'threshold question' [that] ... may be resolved before addressing jurisdiction," explaining that "[i]t would be inconsistent with the unique and categorical nature of the *Totten* bar—a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry—to first allow discovery or other proceedings in order to resolve the jurisdictional question." *Id.* at 6 n.4.

Justice Scalia joined the majority but wrote separately to emphasize his belief that *Tenet* does not broaden *Steel Co.* He argued that when the majority opinion

> describes "the unique and categorical nature of the *Totten* bar ...," it is assuredly not describing the mere everyday absence of a cause of action. As applied today, the bar of *Totten* is a jurisdictional one.
>
> Of course even if it were not, given the squarely applicable precedent of *Totten,* the absence of a cause of action is so

> clear that [the] claims are frivolous—establishing another *jurisdictional* ground for dismissal that the *Steel Co.* majority opinion acknowledges.

Id. at 12 (Scalia, J., concurring) (internal citation omitted). Although the majority opinion does not say explicitly whether *Totten* erects a "jurisdictional" bar, it does state that the rule stems from public policy concerns without mentioning Article III limitations. More significantly, the *Tenet* Court phrases its holding in terms that undermine Justice Scalia's contention: "[T]he *Totten* rule of dismissal ... represents the sort of 'threshold question' [that] ... may be resolved *before addressing jurisdiction.*" *Id.* at 6 n.4 (emphasis added).

Any remaining doubt as to whether a federal court may, in appropriate circumstances, dismiss a case on prudential grounds prior to establishing its jurisdiction was put to rest in *Sinochem International Co. v. Malaysia International Shipping Corp.*, 127 S. Ct. 1184 (2007). In *Sinochem*, the Supreme Court applied *Tenet* to another rule of dismissal "designed ... to preclude judicial inquiry." *Tenet*, 544 U.S. at 6 n.4. The Court held that "a district court has discretion to respond at once to a ... *forum non conveniens* plea, and need not take up first any other threshold objection [such as] ... whether it has authority to adjudicate the cause." *Sinochem*, 127 S. Ct. at 1188. Since dismissal pursuant to the *forum non conveniens* doctrine—like a *Totten* dismissal—"den[ies] audience to a case on the merits," the Court reasoned, it "does not entail any assumption ... of substantive 'law-declaring power.' " *Id.* at 1191-93 (quoting *Ruhrgas*, 526 U.S. at 584-85). No one would contend that *forum non conveniens* constitutes a jurisdictional ground for dismissal. Indeed, the *Sinochem* decision refers to a district court's "discretion to" dismiss pursuant to the doctrine. *Id.* at 1188. *Sinochem* thus firmly establishes that certain non-merits, nonjurisdictional issues may be addressed preliminarily, because " '[j]urisdiction is vital only if the court proposes to

issue a judgment on the merits." ' *Id.* at 1191-92 (quoting *Intec USA, LLC v. Engle,* 467 F.3d 1038, 1041 (7th Cir. 2006)).

There are two lines of analysis pursuant to which it might be argued that *Marshall Field's* enrolled bill rule creates a "jurisdictional" bar. First, because the Court based its holding in part upon separation of powers concerns, *see Marshall Field,* 143 U.S. at 673, the rule could be viewed as an application of the political question doctrine which is derived from Article III's "controversy" requirement, *Massachusetts v. EPA,* 127 S. Ct. 1438, 1452 (2007). *See Baker v. Carr,* 369 U.S. 186, 214-15 (1962) (describing *Marshall Field* as involving considerations similar to those in *Coleman v. Miller,* 307 U.S. 433 (1939), which were "committed to congressional resolution" and based on "criteria of decision that necessarily escape[ ] the judicial grasp"); *Metzenbaum v. FERC,* 675 F.2d 1282, 1287 (D.C. Cir. 1982) (per curiam) (citing *Marshall Field* as an application of the political question doctrine); *see also United States v. Sitka,* 845 F.2d 43, 46 (2d Cir. 1988) ("Another doctrine closely related to—if not inherent in—the political question doctrine is the so-called 'enrolled bill rule.'"); *United States v. Stahl,* 792 F.2d 1438, 1440-41 (9th Cir. 1986) (characterizing extension of the enrolled bill rule as an application of the political question doctrine). *But see INS v. Chadha,* 462 U.S. 919, 943 (1983) (describing *Marshall Field* as "address[ing] and resolv[ing] the question whether" an attested enrolled bill does not become a law if it has not in fact been passed by Congress); *cf. Vander Jagt v. O'Neill,* 699 F.2d 1166, 1170 (D.C.Cir. 1983) (clarifying prudential nature of abstention in case challenging committee seat distribution). Second, because the enrolled bill rule foreordains the failure of Public Citizen's challenge, *Marshall Field* also could be seen as depriving the courts of subject matter jurisdiction with respect to claims that are "so ... foreclosed by prior decisions of [the Supreme] Court

... as not to involve a federal controversy." *Steel Co.*, 523 U.S. at 89 (internal quotation marks omitted).

In any event, the *Marshall Field* rule most certainly falls within the ambit of *Tenet* and *Sinochem*. The District Court "assume[d] without deciding that [the Clerk's] motion to dismiss ... [was] properly made pursuant to [Rule] 12(b)(6)," since it concluded that "the label applied d[id] not affect [its] analysis or outcome." *Public Citizen*, 451 F. Supp. 2d at 113 n.9. But the enrolled bill rule does not authorize a merits dismissal for failure to state a claim. Rather, like the *Totten* rule of dismissal and *forum non conveniens*, the enrolled bill rule is "designed not merely to defeat the asserted claims, but to preclude judicial inquiry," *Tenet*, 544 U.S. at 6 n.4. Where an attested enrolled bill exists, a court must dismiss prior to adjudicating a bicameralism challenge, "'denying audience to [the] case on the merits,'" *Sinochem*, 127 S. Ct. at 1191 (quoting *Ruhrgas*, 526 U.S. at 585). At a minimum, the *Marshall Field* rule is thus a non-merits threshold ground for dismissal. We therefore need not decide whether the enrolled bill rule creates a jurisdictional bar. Nor is it necessary for us to determine whether Public Citizen lacks standing. Accordingly, we will proceed directly to *Marshall Field* dismissal.

C. *The Enrolled Bill Rule*

1. Marshall Field *Squarely Applies*

In *Marshall Field*, importers protesting duties levied against them sought to have the Tariff Act of 1890 declared unconstitutional. 143 U.S. at 662-69. According to the importers, even though the Speaker of the House and the President of the Senate had endorsed the bill as having passed the bodies over which they presided, "it [was] shown by the Congressional record of proceedings, reports of committees of each house, reports of committees of conference, and other papers printed by authority of Congress" that part of the bill

passed was missing in the version enrolled. *Id.* at 668-69. The importers argued that the Journal Clause, *see* U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."), enshrines congressional journals—not the enrolled bill—as "the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by the two houses of Congress." *Marshall Field,* 143 U.S. at 670.

The Court rejected this interpretation of the bicameral passage requirement, holding that the object of the Journal Clause is to ensure transparency in legislative activities, not to "prescribe the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests." *Id.* at 670-71. Recognizing that Congress had long chosen signing of the enrolled bill by the presiding members of both houses as its method of authentication, the Court held that "the judicial department [must] act upon that assurance, and ... accept, as having passed Congress, all bills authenticated in the manner stated." *Id.* at 671-72.

The *Marshall Field* Court rested this conclusion upon two rationales. First, the Court reasoned by reference to public policy:

> [W]e cannot be unmindful of the consequences that must result if this court should feel obliged, in fidelity to the Constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been authenticated by the signatures of the presiding officers of the two houses of Congress, and by the

> approval of the President, and been deposited in the public archives, *as an act of Congress,* was not in fact passed by the House of Representatives and the Senate, and therefore did not become a law.

Id. at 670.

> Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act ... should at any and all times be liable to be put in issue and impeached .... Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable.

Id. at 675 (internal quotation marks omitted); *see also id.* at 676. Second, the Court based its holding on separation of powers concerns, citing "the respect due to a coördinate branch of the government." *Id.* at 673; *see also id.* at 676-77 (explaining that "the spectacle of examination of [congressional proceedings by the courts]" would "*subordinate* [ ] the legislature and disregard[ ] that coequal position in our system of the three departments of government" (internal quotation marks omitted)).

The Court crafted a clear rule: "[I]t is not competent for [a party raising a bicameralism challenge] to show, from the journals of either house, from the reports of committees or from other documents printed by authority of Congress, that [an] enrolled bill" differs from that actually passed by Congress. *Id.* at 680. The only "evidence upon which a court may act when the issue is made as to whether a bill ... asserted to have become a law, was or was not passed by Congress" is an enrolled act attested to by declaration of "the two houses, through their presiding officers." *Id.* at 670, 672. An enrolled bill, "thus attested," "is conclusive evidence that it was passed by Congress." *Id.* at 672-73. "[T]he enrollment itself is the

record, which is conclusive as to what the statute is ...." *Id.* at 675 (internal quotation marks omitted).

In the case at bar, the record contains a copy of the DRA bearing the signatures of then Speaker of the House of Representatives Dennis Hastert and President pro tempore of the Senate Ted Stevens. Where such an attested enrolled bill exists, *Marshall Field* requires "the judicial department to act upon that assurance, and to accept [the bill] as having passed Congress." *Id.* at 672. Even if "the Congressional record of proceedings, reports of committees of each house, reports of committees of conference, and other papers printed by authority of Congress," *id.* at 668-69, indicate that the House voted to enact a 36-month duration of Medicare payments for certain durable medical equipment while the Senate passed a 13-month figure, the courts are barred from considering this extrinsic evidence. The District Court therefore correctly dismissed Public Citizen's complaint pursuant to the enrolled bill rule.

2. *Public Citizen's Attempts to Distinguish and Narrow* Marshall Field

Public Citizen admits that the importers in *Marshall Field* "offered exhibits other than the journals, such as excerpts from the Congressional Record" and acknowledges the Court's references to "reports of committees [and] other documents printed by authority of [C]ongress." Appellant's Br. at 24-25. But Public Citizen argues that since the importers primarily relied upon congressional journals and "journals are the only evidence discussed" at length in the opinion, the *Marshall Field* Court's expansive statements regarding the conclusive nature of the enrolled bill constitute "dicta going beyond what was necessary to decide the case" and the decision should be read to hold only that as between journals and an enrolled bill, the enrolled bill is the superior evidence. *Id.* at 21-25.

We easily reject this attempt to distinguish *Marshall Field* as a case concerned solely with congressional journals. As noted above, the Court first held that "the enrollment itself is the record, which is conclusive as to what the statute is," and it cannot be impeached by other materials. *Marshall Field,* 143 U.S. at 675 (internal quotation marks omitted). The Court then confirmed that "it is not competent for the appellants to show, from the journals of either house, from the reports of committees *or from other documents printed by authority of Congress,* that the enrolled bill ... as finally passed, contained a section that does not appear in the enrolled act." *Id.* at 680 (emphasis added).

Nothing in the *Marshall Field* opinion purports to limit application of the enrolled bill rule to journal-based challenges. And neither of the Court's rationales applies solely to impeachment by journals. No less "uncertainty in the statute laws" upon which "depend public and private interests of vast magnitude," *id.* at 670, 675 (internal quotation marks omitted), would result from allowing collateral attack of the enrolled bill by congressional documents other than journals. And "the spectacle of examination of journals by [the courts]" no more "subordinates the legislature," *id.* at 676-77 (internal quotation marks and emphasis omitted), than does inspection of other materials. *Marshall Field*'s plain language and justification cannot be read to create a rule of dismissal limited to the claims of plaintiffs who rely primarily upon journals to rebut an attested enrolled bill.

Public Citizen also contends that even if *Marshall Field* was not so restricted as originally decided, subsequent precedent has narrowed its holding. We view the legal landscape quite differently. First, the Supreme Court has applied the enrolled bill rule, *see Harwood v. Wentworth,* 162 U.S. 547, 562 (1896) (taking attested enrolled bill of Arizona legislature "to have been enacted in the mode required by law,

and to be unimpeachable"), and extended *Marshall Field's* holding to claims challenging state ratification of constitutional amendments, *see Leser v. Garnett,* 258 U.S. 130, 137 (1922) ("As the Legislatures of Tennessee and of West Virginia had power to [ratify the Nineteenth Amendment], official notice to the Secretary [of State], duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts."); *cf. Sitka,* 845 F.2d at 46-47 (same where Sixteenth Amendment was challenged); *Stahl,* 792 F.2d at 1440-41 (same); *United States v. Thomas,* 788 F.2d 1250, 1253-54 (7th Cir. 1986) (same).

Furthermore, the Courts of Appeals have consistently invoked *Marshall Field* in refusing to conduct other inquiries "into the internal governance of Congress." *Mester Mfg. Co. v. INS,* 879 F .2d 561, 571 (9th Cir. 1989); *see, e.g., United States v. Campbell,* No. 06-3418, 2007 WL 1028785, at *1 (7th Cir. Apr. 3, 2007) (unpublished order) ("Campbell proposes to argue that 18 U.S.C. § 3231, which gives district judges jurisdiction to hear criminal prosecutions, has no legal effect because the House and Senate did not vote on it in the same session of Congress.... The enrolled bill rule prevents looking behind laws in th[at] way ...."); *Mester Mfg.,* 879 F.2d at 570-71 (holding that "[i]n the absence of express constitutional direction, [the courts must] defer to the reasonable procedures Congress has ordained for its internal business" where an employer "assert[ed] that [the Immigration Reform and Control Act of 1986] is entirely null and void, as unconstitutionally passed ... because Congress has no constitutional authority to present a bill after adjournment *sine die*"); *Gibson v. Anderson,* 131 F. 39, 42-43 (9th Cir. 1904) ("The appellant cannot go behind the authenticated published statutes of the United States, and show that an act which purports to have been approved on a certain date was in fact approved on a different date."); *cf. Am. Fed'n of Gov't Employees v. United States,* 330 F.3d 513,

522 (D.C. Cir. 2003) (rejecting the argument that a statute may only be supported by a rational basis included in congressional papers and citing *Marshall Field* for the proposition that "Congress has broad discretion in determining what must be published in the official record").

Finally, the Supreme Court recently reaffirmed *Marshall Field* in a case clarifying the limits of the enrolled bill rule:

> [T]he *Marshall Field* doctrine does not preclude us from asking whether the statute means something other than what the punctuation dictates.... The *Marshall Field* doctrine concerns the nature of the evidence the Court [may] consider in determining whether a bill had actually passed Congress; it places no limits on the evidence a court may consider in determining the meaning of a bill that has passed Congress.

U.S. National Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 n.7 (1993) (internal quotation marks and citation omitted); *cf. United States v. Pabon-Cruz*, 391 F.3d 86, 99-100 (2d Cir. 2004) (finding *Marshall Field* irrelevant where the court's "task ... [was] not to doubt the accuracy or validity of [a bill's] language, but merely to determine what Congress intended by it"); *Cherry v. Steiner*, 716 F.2d 687, 693 (9th Cir. 1983) ("The enrolled bill doctrine ... forestall[s] judicial inquiry into procedural irregularities occurring prior to the enactment of bills, not inherent defects in bills as enrolled.").

Even in the face of this evidence, Public Citizen argues that "there can be no question that courts may look behind an enrolled bill to assess whether a law was passed." Appellant's Br. at 10. Appellant rests this claim on the concluding sentence of an oblique footnote in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), *see id.* at 391 n.4, a case decided three years prior to the Court's reaffirmance of *Marshall Field* in *U.S. National Bank of Oregon*.

In *Munoz-Flores,* a Magistrate ordered the defendant to pay a special assessment for each federal misdemeanor to which he pled guilty. 495 U.S. at 388. Munoz-Flores argued that the statute authorizing such assessments "was passed in violation of the Origination Clause" which "mandates that '[a]ll Bills for raising Revenue shall originate in the House of Representatives.'" *Id.* at 387-88 (quoting U.S. CONST. art. I, § 7, cl. 1). In an earlier Origination Clause decision, the Court avoided determining whether the enrolled bill rule applies to such challenges by first concluding that the act before it was "clearly not a revenue bill." *See Twin City Bank v. Nebeker,* 167 U.S. 196, 200-03 (1897). Although the *Munoz-Flores* Court likewise ultimately decided that the bill at issue "was not one for raising revenue" and therefore found "consideration of [the] origination question unnecessary," 495 U.S. at 401 (internal quotation marks omitted), it first addressed justiciability. The Court framed its holding that Munoz-Flores' claim was justiciable in terms of the traditional political question doctrine under *Baker v. Carr,* never mentioning *Marshall Field* in the text of its opinion. *Id.* at 389-96.

Justice Scalia disagreed with the Court's justiciability determination, stating that the *Marshall Field* "principle, if not the very same holding, [led him] to conclude that federal courts should not undertake an independent investigation into the origination of [a] statute ... [where] ... [t]he designation 'H. J. Res.' (a standard abbreviation for 'House Joint Resolution') attests that the legislation originated in the House." *Id.* at 408-10 (Scalia, J., concurring in the judgment). The *Munoz-Flores* Court responded in a footnote:

> JUSTICE SCALIA ... contends that Congress' resolution of the constitutional question in passing the bill [with an "H. J. Res." designation] bars this Court from independently considering that question. The only case he cites for his argument is *Marshall Field* .... But *Field* does not support

> his argument. That case concerned "the nature of the evidence" the Court would consider in determining whether a bill had actually passed Congress.... The Court rejected [the importers'] interpretation of the Journal Clause, holding that the Constitution left it to Congress to determine how a bill is to be authenticated as having passed. In the absence of any constitutional requirement binding Congress, we stated that "[t]he respect due to coequal and independent departments" demands that the courts accept as passed all bills authenticated in the manner provided by Congress. Where, as here, a constitutional provision *is* implicated, *Field* does not apply.

Id. at 391 n.4 (internal citations omitted).

Public Citizen reads the last lines of this footnote to effectively distinguish between Journal Clause challenges on one hand and Origination Clause and Bicameralism Clause challenges on the other:

> The distinction made ... is between requirements with respect to the enactment of laws and requirements that do not affect valid enactment. Thus, for example, the Constitution requires Congress to keep journals, but neither the Constitution nor any statute conditions the enactment of laws on the keeping of journals or imposes requirements on the content of journals. Accordingly, as in *Marshall Field,* the content of congressional journals cannot be used to impeach the validity of an enrolled bill that has been signed ... On the other hand, the Constitution requires that legislation to raise revenue originate in the House. Therefore, as in *Munoz-Flores,* the courts may look beyond an enrolled bill to determine whether a law has been passed in accordance with that constitutional condition ...
>
> At issue in this case is another requirement for the valid enactment of law—the requirement that identical legislation

> be passed in both the House and the Senate before it is presented to the President for his signature. In accordance with both *Munoz-Flores* and *Marshall Field,* the Court can and should examine the evidence that this requirement has been violated.

Appellant's Br. at 10-11.

Public Citizen's attempt to square the *Munoz-Flores* footnote with Court precedent fails. In assessing appellant's claim, it is important to recall that *Munoz-Flores* did not in any way involve the question raised in *Marshall Field, i.e.,* whether an authenticated enrolled bill had passed Congress. The question instead was whether a provision that unquestionably had passed Congress constituted a bill for raising revenue. It is not plausible to think that the Court meant to overrule the enrolled bill rule in the last two sentences of an obscure footnote in a case that did not involve an application of the rule. Under Public Citizen's interpretation, the *Munoz-Flores* Court overruled the time-tested *Marshall Field* decision *sub silento* in a footnote, and then three years later inadvertently referenced the purportedly defunct rule in *U.S. National Bank of Oregon. See* 508 U.S. at 455 n.7. The argument collapses under its own weight.

The last two sentences of the cited footnote in *Munoz-Flores* defy easy comprehension. Nonetheless, the text of the footnote is clear on one point: the Court did not mean to overturn or modify the enrolled bill rule of *Marshall Field.* The Court's footnote in *Munoz-Flores* clearly states that "[t]he respect due to coequal and independent departments demands that the courts accept as passed all bills authenticated in the manner provided by Congress." 495 U.S. at 392 n.4 (internal quotation marks omitted). The Court then says: "Where ... a constitutional provision *is* implicated, *Field* does not apply." *Id.* In other words, *Marshall Field does* apply in a case of the sort

at hand, where the court must "accept as passed [the bill] authenticated in the manner provided by Congress." *Id.* There is nothing in the footnote to indicate that the Court meant to distinguish between challenges arising under the Journal Clause as opposed to challenges arising under the Origination Clause and Bicameralism Clause, as Public Citizen suggests. Indeed, the footnote appears unambiguous in reaffirming that there can be no Bicameralism Clause challenge when a bill has been authenticated in the manner provided by Congress. The text of the footnote may be less than carefully crafted, but it does not admit of the strained construction offered by appellant.

Even more problematic for Public Citizen is that, given our finding that *Marshall Field* has not been overturned or modified by *Munoz-Flores,* there can be no doubt that the application of appellant's theory to the case at bar is positively foreclosed by *Marshall Field.* The decision in *Marshall Field* addressed a bicameralism challenge, so for us to embrace Public Citizen's argument that the enrolled bill rule does not apply to "requirement[s] for the valid enactment of law," such as the Bicameralism Clause, would be tantamount to narrowing *Marshall Field* entirely out of existence. Public Citizen's claim that *Marshall Field* involved only a Journal Clause challenge and no bicameralism challenge is belied by the facts of that case. Although the importers sought support from the Journal Clause in their attempt to impeach the attested enrolled bill, they advanced a Bicameralism Clause challenge, just as Public Citizen does.

We acknowledge that the language of the *Munoz-Flores* footnote is cumbersome, making it difficult to discern precisely what the Court meant to say. The footnote indicates that the "H. J. Res." moniker does not carry the conclusive weight in the Origination Clause context that the signatures of the presiding officers command in the Bicameralism Clause context. In the text of its decision, the *Munoz-Flores* Court stated that

adjudication of an Origination Clause challenge despite the existence of an "H. J. Res." designation no more "express[es] a lack of respect for the House of Representatives" than does any other constitutional challenge. *Id* . at 390-91 (internal quotation marks and alteration omitted). In light of this conclusion, the *Munoz-Flores* footnote might be seen as a simple attempt, in response to Justice Scalia's contention to the contrary, to distinguish Origination Clause challenges from Bicameralism Clause challenges based on the lesser applicability of the separation of powers rationale in the former context. This is hardly a satisfying explanation, however. Alternatively, the footnote might be viewed as an *ex post* interpretation of *Marshall Field.* In other words, if in the post-*Marshall Field* legal landscape any bicameralism challenge made in the face of an attested enrolled bill really raises no constitutional claim, the *Munoz-Flores* Court could have—with perfect hindsight—treated the claim in *Marshall Field* itself as similarly implicating no constitutional provision. This makes some sense. We need not resolve the puzzle of the footnote, however, because we are satisfied that the Court's decision in *Munoz-Flores* does not purport to overrule or modify the enrolled bill rule.

At bottom, Public Citizen asks that we set aside directly controlling Supreme Court precedent in favor of an ambiguous footnote. Public Citizen attempts to alter the balance, arguing that the engrossed bill it proffers as evidence that the House passed a 36-month duration figure is a "public record" far more reliable than journals and one given "official status" when Congress adopted 1 U.S.C. § 106 after the Court decided *Marshall Field.* Appellant's Br. at 31-34. But this is beside the point, because the argument in no way undercuts the public policy and separation of powers rationales that undergird the enrolled bill rule. One need only look to the breadth of the DRA to understand the "vast magnitude" of "public and private

interests" which depend upon the certainty of statutes. *Marshall Field,* 143 U.S. at 670. And today, no less than in 1892, the spectacle of courts directing legislative authentication procedures and otherwise meddling in the inner workings of Congress "disregards that coequal position ... of the three [branches] of government." *Id.* at 676 (internal quotation marks omitted).

The Supreme Court has repeatedly cautioned that we "should [not] conclude [that its] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton,* 521 U.S. 203, 237 (1997). Therefore, even if we were inclined to think that the *Munoz-Flores* footnote offers some *implicit* support for Public Citizen's position—and we are not—this would not change the outcome that we reach today. The District Court correctly decided that the enrolled bill rule governs the disposition of this case.

III. CONCLUSION

For the reasons set forth above, we affirm the judgment of the District Court.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN,
Plaintiff,

v. Civil Action No. 06-0523 (JDB)

CLERK, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,
Defendant.

MEMORANDUM OPINION

News reports and statements from Congressional leaders have widely reported that the Deficit Reduction Act of 2005 ("DRA" or "Act"), Pub.L. 109-171, 120 Stat. 4 (Feb. 8, 2006), though bearing the signatures of the leaders of the House and Senate and signed into law by the President, was not, in fact, passed by the House and Senate in the same form, as mandated by the bicameral requirement of Article I, Sections 1 and 7 of the United States Constitution.[1] Plaintiff Public Citizen

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[1] *See, e.g.*, David Rogers, *Bill to Cut Deficit Is Signed By Bush After a Scramble,* Wall St. J., Feb. 9, 2006, at A4; Jonathan Weisman, *Spending Measure Not a Law, Suit Says: Senate, House Versions Are Different,* Wash. Post, Mar. 22, 2006, at A4; T.R. Goldman, *Loose Language in Deficit Act Elicits Lawsuit,* Legal Times, Apr. 3, 2006, at 1; *see also* Letter from Henry Waxman, Ranking Minority Member, U.S. House of Representatives, to Nancy Pelosi, Democratic Leader, U.S. House of Representatives, Feb. 14, 2006, at 1 ("the version of the legislation signed by the President on February 8, 2006, is

challenges the constitutionality of the DRA, and has moved for summary judgment proffering as its undisputed evidence Congressional documents allegedly indicating a significant variation in the bills voted upon by the two houses of Congress. Hence, Public Citizen seeks to prove its case with documents from the proceedings of Congress. But is the Court authorized to make an evidentiary inquiry into the Congressional proceedings giving rise to the Act in order to determine whether the bicameral requirement has been satisfied? That question lies at the heart of this case.

Defendant moves to dismiss the complaint on the ground that the Supreme Court has foreclosed judicial consideration of such evidence—indeed, of the claim itself—under the "enrolled bill rule" of *Marshall Field & Co. v. Clark,* 143 U.S. 649 (1892), which deems "complete and unimpeachable" the authentication of an enrolled bill by the signatures of the Speaker of the House, the President of the Senate, and the President of the United States.[2] In the alternative, defendant contends that plaintiff's motion for summary judgment should be denied because plaintiff's evidence does not, in fact,

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substantively different from the version voted on by the House on February 1, 2006"), available at http:// www. democrats. reform. house. gov/ story. asp? ID= 1007; *Conyers v. Bush,* No. 06-11972 (E.D.Mich.) (complaint filed Apr. 28, 2006) (lawsuit by eleven members of the House alleging that Deficit Reduction Act of 2005 differs substantively from the bill passed by the House).

[2]For ease of reference, the Court will refer to plaintiff's memorandum in support of its motion for summary judgment as "Pl.'s Mem.," and defendant's memorandum in support of its motion to dismiss and in opposition to plaintiff's motion as "Def.'s Mem."

establish that the House passed a bill that differs from the one passed by the Senate.[3] A hearing on the motions was held on July 10, 2006..

BACKGROUND

The Deficit Reduction Act of 2005 contains ten titles affecting a broad array of interests. These include the Federal Deposit Insurance Reform Act of 2005 (§§ 2101-09), which affects changes in deposit insurance coverage and requires the merger of two insurance funds into a single fund; the Digital Television Transition and Public Safety Act of 2005, which regulates the auctions for spectrum allocated for commercial wireless services (§§ 3001-13); amendments to the Social Security Act effecting broad changes to the laws governing Medicare and Medicaid coverage (§§ 5001-5302, 6001-6087); assistance to areas affected by Hurricane Katrina (§§ 6201-03); the Higher Education Reconciliation Act of 2005 (§§ 8001-24), which affects significant changes to the laws governing student loans; and provisions increasing the filing fees in the federal court system (§§ 10001, 10101). Public Citizen, a not-for-profit consumer advocacy organization, alleges that it is aggrieved by the last of these, § 10001(a), specifically the increase in the civil action filing fee in United States district courts from $250 to $350.[4] Although the particular provision creating the issue

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[3]A group representing the wireless communications industry, CTIA - The Wireless Association, has filed an amicus brief in support of defendant's motion to dismiss and in opposition to plaintiff's motion for summary judgment.

[4]Defendant in this case is nominally the Clerk of the Court for this judicial district because plaintiff seeks an order enjoining the Clerk from imposing the increased filing fee authorized by the DRA. However, the executive branch, rather

here lies in another title of the Act, plaintiff contends that the flaw renders the entirety of the DRA unconstitutional.

Plaintiff alleges that an error by the Secretary of the Senate in preparing the budget bill that became the DRA, S.1932, for transmittal to the House resulted in the House and Senate passing bills with different Medicare provisions, and that the House version differs from that ultimately signed into law as the Deficit Reduction Act of 2005. Plaintiff's complaint and briefs contain detailed allegations of the sequence of events giving rise to the alleged error, but to resolve the present motions, the Court will focus its review on the factual allegations described by plaintiff as material to the constitutional issue. Pl.'s Mot. for Summ. J., Statement of Material Facts ("Pl.'s Statement of Material Facts"); Unofficial Tr. of Mot. Hrg. ("Tr.") at 10-12 (July 10, 2006).

The Act, as signed by the President, states that the duration of Medicare payments for certain durable medical equipment is 13 months. Pub.L. 109-171, § 5101(a)(1), 120 Stat. 4, 37-38. Plaintiff alleges that the 13-month limitation reflects the version of S.1932 passed by the Senate on December 21, 2005. Compl. ¶ 12; Pl.'s Statement of Material Facts ¶ 3 (citing 151 Cong. Rec. S14337, S14346-47 (Dec. 21, 2005)). Plaintiff further alleges, however, that the version of S.1932 engrossed by the Senate later that day—that is, formally printed and signed by the Secretary of the Senate for transmission to the House pursuant to 1 U.S.C. § 106 ("engrossed

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than the judiciary, is the real party in interest. As discussed in more detail above, the DRA is an act to provide for reconciliation of the budget for fiscal year 2006 and has a sweeping impact on programs managed by agencies within the executive branch.

bill")[5]—erroneously stated a different duration for Medicare payments for the same durable medical equipment—36 months. Compl. ¶ 12; Pl.'s Statement of Material Facts ¶ 4 & n.2 (citing S.1932 as engrossed in the Senate, as reported on the GPO website).[6] This error allegedly resulted in the House voting on and passing S.1932 as engrossed by the Senate with the erroneous 36-month limitation. Compl. ¶ 13; Pl.'s Statement of Material Facts ¶¶ 4-5 (citing 152 Cong. Rec. H68, H69-77 (Feb. 1, 2006) and 152 Cong. Rec. S443 (Feb. 1, 2006)).[7] The

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[5]This section states: "Every bill or joint resolution in each House of Congress shall, when such bill or resolution passes either House, be printed, and such printed copy shall be called the engrossed bill or resolution as the case may be. Said engrossed bill shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and in that form shall be dealt with by that House and its officers, and, if passed, returned signed by said Clerk or Secretary. When such bill, or joint resolution[,] shall have passed both Houses, it shall be printed and shall then be called the enrolled bill, or joint resolution, as the case may be, and shall be signed by the presiding officers of both Houses and sent to the President of the United States...." 1 U.S.C. § 106.

[6]The GPO website identifies several versions of S.1932, and distinguishes the engrossed bill as "S.1932(eas) [engrossed amendment Senate]." *See* Congressional Bills: 109th Congress Catalog—Senate Bills (undated) (brackets in original), available at http:// frwebgate. access. gpo.gov/cgi-bin/BillBrowse.cgi? dbname=109_cong_bills&wrapperTemplate= BillBrowse_wrapper.html&billtype=s.

[7]In budgetary terms, the difference is not insignificant, amounting to an estimated $2 billion over five years. *See* Pl.'s

"enrolled" bill was then prepared—the version formally printed pursuant to 1 U.S.C. § 106 after passage by both houses—incorporating the 13-month limitation in section 5101(a). Compl. ¶ 14. The Speaker of the House and President pro tempore of the Senate subsequently signed the enrolled version of S.1932 as an attestation that it had been passed by both houses of Congress, and this bill was then signed by the President. Compl. ¶¶ 15-16; Pl.'s Mem. at 5 (citing 152 Cong. Rec. S768 (Feb. 7, 2006)). Plaintiff contends that these factual allegations, supported by Congressional documents, prove that the version of S.1932 signed by the President and passed by the Senate reflects a 13-month period for certain Medicare payments, but that this 13-month period was not in the version of the bill passed by the House. Compl. ¶¶ 14-15; Pl.'s Mem. at 8-10.

Defendant contends principally that the Court may not look beyond the enrolled bill authenticated by the presiding officers of the House and Senate pursuant to *Marshall Field*. Moreover, according to defendant, if the Court did look beyond the authenticated enrolled bill, the evidence should be construed as showing that the House passed the bill as actually amended by the Senate without the engrossing error—that is, with the 13-month provision as passed by the Senate. As defendant construes the evidence, the House technically voted on the House resolution accepting the Senate amendment—House Resolution 653—which does not itself specify that the Senate amendment voted on by the House is as reflected in the Senate engrossed bill, rather than as passed by the actual Senate vote. Def.'s Mem., Statement of Genuine Issues ¶ 4. House Resolution 653 merely states: "Resolved, That the House

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Mem. at 3 (citing Letter from Congressional Budget Office Acting Director Marron to Rep. Spratt, Jr. (Feb. 13, 2006)).

hereby concurs in the Senate amendment to the House amendment to the bill (S.1932) to provide for reconciliation pursuant to section 202(a) of the concurrent resolution on the budget for fiscal year 2006 (H.Con.Res.95)."[8] 152 Cong. Rec. H37 (Feb. 1, 2006). As reported in the Congressional Record, under the heading "Deficit Reduction Act of 2005," the vote took place as follows:

> The SPEAKER pro tempore (Mr. Foley). The pending business is the vote on adoption of House Resolution 653 on which the yeas and nays are ordered.
>
> The Clerk read the title of the resolution.
>
> The SPEAKER pro tempore. The question is on the resolution.
>
> This will be a 5-minute vote.
>
> The vote was taken by electronic device, and there were—yeas 216, nays 214, not voting 3, as follows: [listing of 433 names is then provided in the Congressional Record text]

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[8]The cross-reference to section 202(a) of H. Con. Res. 95 is not material to the issue presented here. The resolution was reportedly agreed to on April 28, 2005, eights months before the engrossing error, and sets forth budgetary levels for fiscal year 2006 and reconciliation provisions, which then led to S.1932. Section 202(a), in particular, sets forth "spending reconciliation instructions" and required the Committee on the Budget to report to the Senate a reconciliation bill carrying out certain recommendations. *See* H. Con. Res. 95 (enrolled version), available at http://www.gpoaccess.gov/bills/browse.html (follow "HConRes" hyperlink; then follow "HConRes 95(enr)" hyperlink); *see also* 151 Cong. Reg. H2660, H2663 (Apr. 28, 2005).

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore (during the vote). Members are advised there are 2 minutes remaining.

So the resolution was agreed to.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

The SPEAKER pro tempore. Pursuant to House Resolution 653, the House concurs in the Senate amendment to the House amendment to S.1932.

The text of the Senate amendment to the House amendment is as follows:

. . . . .

152 Cong. Rec. H68-H69 (Feb. 1, 2006). The text of the amendment then published in the Congressional Record contains the erroneous 36-month limitation in section 5101(a)(1). *Id.* at H77. In defendant's view, however, the publication of the 36-month text in section 5101(a)(1) is of no moment because it occurred *after* the House had passed House Resolution 653 concurring in the Senate amendment without qualification. Plaintiff disputes this characterization of the facts, contending that under the rules of the House and 1 U.S.C. § 106, the House may only vote on the engrossed bill and, in any event, the House leadership and Clerk of the House subsequently have acknowledged in letters and other statements that the vote was upon the engrossed bill containing the erroneous 36-month provision. Pl.'s Reply Br. at 2-6 & Ex. E. Defendant responds that making a legal presumption about the matter voted upon is inappropriate if the Court is to engage in the factual inquiry sought by plaintiff in the first place.

STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure will not be granted unless "it

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[9] *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see also Haynesworth v. Miller,* 820 F.2d 1245, 1254 (D.C. Cir. 1987). All that the Federal Rules of Civil Procedure require of a complaint is that it contain "'a short and plain statement of the claim ... giv[ing] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Dura Pharm., Inc. v. Broudo,* 544 U.S. 336, 346 (2005) (quoting *Conley,* 355 U.S. at 47). "Given the Federal Rules' simplified

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[9]Defendant's motion could be characterized instead as a motion to dismiss for lack of subject matter jurisdiction because the legal principle invoked has, at times, been characterized as one derived from the political question doctrine. *See Baker v. Carr,* 369 U.S. 186, 214 (1962) (describing *Marshall Field* as involving a political question); *United States v. Sitka,* 845 F.2d 43, 46 (2d Cir. 1988) ("Another doctrine closely related to—if not inherent in—the political question doctrine is the so-called 'enrolled bill rule.' "). However, the Supreme Court has at other times referred to *Marshall Field* as a case that reached the merits or addressed evidentiary limitations. *See INS v. Chadha,* 462 U.S. 919, 943 (1983) (characterizing the case as a merits resolution); *United States v. Munoz-Flores,* 495 U.S. 385, 391-92 & n.4 (1990) (characterizing the case as concerning "the nature of the evidence" competent to prove a violation of the bicameral requirement). Because the most recent cases do not refer to the enrolled bill rule as a limitation on subject matter jurisdiction, and the label applied does not affect this Court's analysis or outcome, the Court will assume without deciding that defendant's motion to dismiss relying on *Marshall Field* is properly made pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 514 (2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). Thus, under Rule 12(b)(6), the plaintiff's factual allegations must be presumed true, and the plaintiff must be given every favorable inference that may be drawn from those factual allegations. *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 193 (D.C.Cir.2006); *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). Some factual allegations may render success on the merits impossible, and these also are accepted as true. *Trudeau*, 456 F.3d at 193. The Court need not accept as true "a legal conclusion couched as a factual allegation," nor inferences that are unsupported by the facts set out in the complaint. *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The motion must be supported by "such facts as would be admissible in evidence." Fed. R. Civ. P. 56(e).

Application of these traditional standards of review may appear, on first blush, impracticable here because the thrust of defendant's motion is that the only fact appropriate for judicial consideration is the DRA as enrolled and signed and plaintiff's proffered evidence beyond that document may not be considered at all. However, the Court has concluded that application of these standards of review is not only required, but makes sense—for the Court must determine whether the

enrolled bill rule of *Marshall Field* applies even if the facts alleged by plaintiff are true and even if the proffered evidence would, as plaintiff contends, support those allegations. Thus, for purposes of resolving the present motions, the Court presumes that the factual allegations (but not the legal conclusions) in the complaint are true, and that if plaintiff's proffered evidence were accepted, it would support those factual allegations.

DISCUSSION

I. Overview

Plaintiff argues that the undisputed material facts, as evidenced by the Senate engrossed bill, the Congressional Record reports of the Senate vote and the House vote, and the enrolled bill as signed, establish that the DRA violates the bicameral requirement of the United States Constitution.[10]

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[10]Amicus CTIA contends that plaintiff lacks standing to pursue this action on the ground that plaintiff's injury is not redressable by the Court because the DRA provision that allegedly failed to pass in the House is severable from the remainder of the DRA. Amicus Br. at 18-22. This argument ignores the requirement that, in evaluating standing, a court presumes that the plaintiff will prevail in the action. *See Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 & n.1, 665 (D.C. Cir. 1996) (en banc). Applying that presumption, the Court finds that plaintiff satisfies the redressability element of the standing inquiry. Neither amicus nor defendant questions plaintiff's satisfaction of the remaining standing elements—injury and causation—and the Court sees no inadequacy in those respects. Plaintiff has submitted an affidavit stating that it has been required to pay the increased fee for filing a civil action in federal district court, pursuant to

Defendant counters that the "enrolled bill rule" recognized by the Supreme Court in 1892 in *Marshall Field* still applies today, and pursuant to the rule a claim of a bicameral clause violation is not legally cognizable where an enrolled bill has been signed by the presiding officers of the House and Senate as well as the President, because that evidence is, as a matter of law, "complete and unimpeachable," thus precluding judicial consideration of any other evidence. So stated, it is apparent that the legal issues in this case are not complex. Indeed, two other district courts have summarily dismissed challenges to the DRA relying on *Marshall Field,* finding no need to reexamine the meaning or status of that seminal authority. *See OneSimpleLoan v. United States Sec'y of Educ.,* 2006 WL 1596768, at *9 (S.D.N.Y. June 9, 2006); *State of California v. Leavitt,* 444 F.Supp.2d 1088, 2006 WL 2034650, at *6 (E.D. Cal. July 18, 2006). However, in this Court's view, the questions raised by plaintiff regarding the meaning of *Marshall Field* and its continuing vitality more than 100 years after its issuance require a more complete examination of the arguments presented by the parties.

Certain fundamental principles are not in dispute. The bicameral requirement embodied in Article I, Sections 1 and 7, requires that the same bill—that is, the same text—be passed by both chambers of Congress. *Clinton v. City of New York,* 524 U.S. 417, 448 (1998) (emphasizing that "if one paragraph of ... text" is omitted from the bill passed by either house of Congress or signed into law by the President, the law would fail

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section 10001(a) of the DRA, and that it anticipates filing additional cases in the future. *See* Pl.'s Mot. for Summ. J., Decl. of Adina Rosenbaum.

to comply with the bicameral requirement).[11] Absent bicameral passage, a bill does not become a law—a principle recognized in *Marshall Field* itself. *See* 143 U.S. at 669 ("The argument is ... that a bill ... does not become a law of the United States if it had not in fact been passed by Congress. In view of the express requirements of the Constitution the correctness of this general principle cannot be doubted."); *see also INS v. Chadha,* 462

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[11]Article I, Section 1, states: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Section 7, Clause 2 states:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevents its Return, in which Case it shall not be a Law.

U.S. 919, 949-50 (1983) ("By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief ... that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials."); *Clinton,* 524 U.S. at 439-40 ("the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure'" pursuant to Article I) (quoting *Chadha,* 462 U.S. at 951). Defendant contends, however, that these principles do not resolve the question whether the Court is authorized to consider the evidence proffered by plaintiff.

On its face, the "enrolled bill rule" of *Marshall Field* requires the Court to accept the signatures of the Speaker of the House and President pro tempore of the Senate on the enrolled bill as "complete and unimpeachable" evidence that the bill has been passed by both chambers of Congress. The seminal passage from *Marshall Field* establishing this rule states:

> The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed *complete and unimpeachable.* ... [The enrolled act] carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with

> the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated: leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution.

143 U.S. at 672 (emphasis added).

Plaintiff contends that the reach of *Marshall Field* does not extend to the present case for several reasons: first, it addressed a Presentment Clause violation, rather than a violation of the bicameral passage requirement; second, its holding covers only whether journals of Congress kept pursuant to the Journal Clause of the Constitution are admissible as evidence in a case alleging a bicameral violation; third, Supreme Court decisions contemporaneous with *Marshall Field* support a narrow construction of the decision; and fourth, more recently, *United States v. Munoz-Flores,* 495 U.S. 385 (1990), limited and questioned the holding of *Marshall Field.* The first two contentions can be rejected based on a review of the plain language of *Marshall Field* itself. The impact of subsequent cases on *Marshall Field* raises significant questions, but in the absence of an express overruling of the case by the Supreme Court, this Court is constrained to conclude that the rule remains in full effect today.

II. The Scope of *Marshall Field*

Plaintiff contends that *Marshall Field* does not speak to the issue of what evidence may be considered where a violation of the bicameral requirement is alleged, because the case addressed a Presentment Clause violation—that is, both chambers had passed the same bill, but the bill presented to and signed by the President omitted a duly passed provision. Pl.'s

Reply Mem. at 8-10 & n.3. The Court's opinion in *Marshall Field,* however, clearly framed the issue as one involving an alleged violation of the bicameral requirement and it is difficult to discern how any other characterization could apply. The appellant in *Marshall Field* challenged the validity of the Tariff Act of October 1, 1890 on the ground that "it had not in fact been passed by Congress." 143 U.S. at 669. Specifically, the appellant alleged that a section of the bill passed by both houses—referred to as a tobacco rebate provision—was not in the enrolled bill authenticated by the signature of the presiding officers of the House and Senate and approved by the President. *Id.* at 668-69. The Supreme Court thus focused its analysis on "the nature of the evidence upon which a court may act *when the issue is made as to whether a bill ... was or was not passed by Congress." Id.* at 670 (emphasis added). To be sure, the alleged omission of the tobacco rebate provision from the Tariff Act involved the additional problem of a Presentment Clause violation, insofar as a bill presented to the President must be one passed by both chambers of Congress. But the presence of that problem does not negate the violation alleged and considered in *Marshall Field*—that the version of the bill signed into law had not passed the two chambers of Congress. This is, in its essence, the same issue presented here.

Plaintiff's principal argument is that the holding of *Marshall Field* is limited to assessing the competence of only one type of evidence in determining bicameral passage—the journals kept by Congress pursuant to the Journal Clause of the Constitution.[12] Acknowledging that granting an enrolled bill

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[12]The Journal Clause states: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either

"complete and unimpeachable" status—as *Marshall Field* appears to require—would be fatal to its case, plaintiff attempts to characterize that passage as nonbinding dictum, arguing that the issue decided concerned only the competence of legislative journals, and nothing else, as evidence of whether a bill was passed by Congress. *See* Pl.'s Mem. at 12-18; *see also* Tr. at 43-44. In support of this characterization, plaintiff notes that the Supreme Court's primary discussion of the evidence at issue focused on the journals of Congress and the problems associated with consideration of those journals. Plaintiff also points out that the brief submitted on behalf of the United States in *Marshall Field* considered the journals so significant to the case that it attached an appendix containing a list of state authorities addressing whether legislative journals could be used to impeach an enrolled act. *See* Pl.'s Mem. at 13 (citing 143 U.S. at 661-66) (reproducing brief of United States).

This characterization of the factual record in *Marshall Field* fails to give due regard to other aspects of the evidentiary record before the Supreme Court and, more significantly, fails to give effect to the plain language of the Court's holding. At the outset of its opinion, the Court recognized that the issue presented involved different types of evidence from the proceedings of Congress, and framed the appellant's argument as relying upon "the Congressional record of proceedings, reports of committees of each house, reports of committees of conference, and other papers printed by authority of Congress, and having reference to [the house bill]" to show that a section of the bill had been omitted from the enrolled act. 143 U.S. at 668-69. The *Marshall Field* Transcript of Record lists 11

House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal." U.S. Const., art. I, § 5, cl. 3.

exhibits, including six documents from *The Congressional Record* and three versions of the bill at issue, H.R. 9416.[13] Hence, the Supreme Court was not merely rendering an advisory opinion when it stated that an enrolled bill, signed by the presiding officer of each chamber of Congress and then by the President, is "complete and unimpeachable"—unassailable by legislative journals or other evidence. The exclusion of *any*

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[13]The Transcript of Record lists the documents as:

> No. 1. H.R. 9416 (Report No. 1466): A Bill to reduce the revenue, & c., in the House of Representatives, April 18th, 1890.
>
> No. 2. H.R. 9416 in the Senate: An Act to reduce the revenue, & c., as reported by Mr. Morrill, with amendments, September 9th, 1890.
>
> No. 3. Tariff of 1890. Conference Report with Bill H.R. 9416.
>
> No. 4. Congressional Record, Vol. 21, No. 237.
>
> No. 5. Congressional Record, Vol. 21, No. 238.
>
> No. 6. Congressional Record, Vol. 21, No. 239.
>
> No. 7. Congressional Record, Vol. 21, No. 240.
>
> No. 8. Report No. 1466 to accompany H.R. 9416, April 16th, 1890.
>
> No. 9. An Act to reduce the revenue and equalize duties on imports and for other purposes. Public No. 330.
>
> No. 10. Annual report of the secretary of the treasury on the state of the finances for 1889.
>
> No. 11. Congressional Record, Vol. 22, pages 217, 275 & 582.

Transcript of Record at 23, *Marshall Field & Co. v. Clark,* No. 1,052 (U.S. Oct. Term 1891) (attached to Pl.'s Reply Mem., Ex. F.).

other evidence beyond the enrolled bill was reiterated with specificity in the Court's final paragraph on the issue:

> We are of opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either house, from the reports of committees or from other documents printed by authority of Congress, that the enrolled bill designated H.R. 9416, as finally passed, contained a section that does not appear in the enrolled act in the custody of the State Department.

143 U.S. at 680.

Both sides attempt to parse through the 1891 Transcript of Record and determine whether, in light of the contents of the documents, the appellant relied solely on the journals to prove its case (which would then render the Supreme Court's opinion as to other evidence dictum), or necessarily relied on Congressional documents beyond journals. This Court has reviewed those exhibits and concludes that the text of the documents does not weigh clearly in favor of drawing one inference or the other, and more significantly, that engaging in speculation that some of the documents were superfluous to the case is inappropriate, in light of the Supreme Court's clear statement that other specific Congressional documents, in addition to journals, were not competent to determine the factual issue of bicameral passage. *See* 143 U.S. at 669, 680.

This is not to belittle plaintiff's characterization of the decision in *Marshall Field* as bearing on, and being heavily influenced by, legislative journals. The Supreme Court discussed at length whether legislative journals had any role in determining whether bicameral passage of a bill had been achieved, noting that "[i]t was assumed in argument that the object of [the journal] clause was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by the two houses of Congress." 143 U.S.

at 670. The Court then rejected that proposition, explaining that the Journal Clause does not on its face require that result, and discussed the significant problems that consideration of journals would pose, as reported in several state court decisions. *Id.* at 670-78. The problems described were in the nature of the unreliability of journals generally, due to the time pressures under which they are prepared and the distractions of legislative business; intentional corruption of journals; the uncertainty of the laws that reliance on journals would yield; and the litigation that acceptance of journals as evidence would likely generate, with the undesirable result of subordinating the legislature to the judiciary. *Id.* But all those concerns, while focused on journals, were implicated by other types of evidence as well—"loose papers of the legislature," "parol evidence," or "any other mode" of evidence beyond the authentication by the presiding officers. *See id.* at 674-75. This is to be expected, for it would make little sense to interpret the Supreme Court's holding as excluding the legislative journals that the Constitution requires, but leaving the door open to the use of documents of some lesser stature under the law—that would elevate other evidence over evidence that the Constitution requires Congress to maintain. *Marshall Field* closes the door on that end-run around the prohibition against the use of journals as evidence of failure to comply with the bicameral requirement, holding that the authentication of the enrolled bill is "complete and unimpeachable," and explicitly rejecting any contrary evidence "from the journals of either house ... or from other documents printed by authority of Congress."[14] *Id.* at 680.

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[14]Even if the "complete and unimpeachable" holding could be described as dictum, "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006).

The Supreme Court was fully aware that, under this rule, it becomes possible for a bill to take on the force of law despite a failure to pass both chambers of Congress. *Id.* at 672-73. It concluded, however, that "[t]he evils that may result from the recognition of the principle that an enrolled act [bearing the signatures of the presiding officers] ... is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them." *Id.* at 673. When the Supreme Court later extended the principle of *Marshall Field* to other settings, it considered the dangers posed by this rule once again but adhered to the rule nonetheless, finding the potential adverse consequences outweighed by the dangers of opening the door to evidence of unknown reliability. *See Harwood v. Wentworth,* 162 U.S. 547, 562 (1896) ("how much greater is the danger of permitting the validity of a legislative enactment to be questioned by evidence furnished by the general indorsements made by clerks upon bills previous to their final passage and enrollment—indorsements usually so expressed as not to be intelligible to any one except those who made them ...").[15] Considering the plain language of *Marshall*

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[15]The Supreme Court concluded that any concerns with the enrolled bill rule could be addressed by Congress, which has the authority to declare under what circumstances an enrolled act of Congress may be shown to depart from the form of the bill passed. *Harwood,* 162 U.S. at 560. There is no indication that Congress has overruled or modified the enrolled bill rule. Indeed, 1 U.S.C. § 106, requiring that a bill, once passed by both houses, shall be "enrolled" and "signed by the presiding officers of each House," would appear to validate it.

Field, the evidence of record, and the Supreme Court's explicit recognition of the impact of its holding, the Court concludes that the statements in *Marshall Field* as to the "complete and unimpeachable" status of a signed enrolled bill, and the exclusion of other documents printed by authority of Congress because they are "not competent" to prove whether a bill passed, constitute conclusions essential to the Court's holding, rather than non-binding dicta.

III. Impact of Other Nineteenth Century Cases on *Marshall Field*

Plaintiff also contends that other cases have limited the holding of *Marshall Field* in some respects. It points to a handful of cases in which legislative journals were discussed in resolving the merits of the case, positing that those discussions show that the characterization of an enrolled bill and attestation as "complete and unimpeachable" is not absolute. The Court disagrees with plaintiff's assessment.

In *United States v. Ballin,* 144 U.S. 1 (1892)—issued the same day as *Marshall Field*—the Supreme Court considered whether an enrolled act was in compliance with the constitutional requirement that a quorum of each house be present to do business. 144 U.S. at 4-5. The case was unlike *Marshall Field* in that it involved a situation where the Constitution required certain facts at issue to be placed on the journal—the recording of members' votes upon the request of one-fifth of those present, pursuant to Article I, Section 5 of the Constitution. *Id.* at 4 (stating that it was "[a]ssuming by reason of this latter clause reference may be had to the journal"). In

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See United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 455 n.7 (1993) (citing 1 U.S.C. § 106 as consistent with *Marshall Field*).

that context, the Supreme Court "assumed ... without deciding" that the journals may be considered and proceeded to consider the journals to determine whether the required quorum was present, finding nothing inconsistent with *Marshall Field.* 144 U.S. at 3-4. Indeed, *Marshall Field* itself expressly reserved ruling on the issue of whether journals may be considered where "the Constitution expressly requires that [a matter] shall be entered on the journal." 143 U.S. at 671.

Subsequently, in *Lyons v. Woods,* 153 U.S. 649 (1894), the Supreme Court applied the enrolled bill rule of *Marshall Field* to determine whether legislation of a U.S. territory subject to substantially the same legislative requirements as found in Article I, Section 7 had been validly enacted. 153 U.S. at 662-63 ("In *Field v. Clark,* it was held by this court upon great consideration that ... authentication [of an enrolled bill] as a bill that has passed Congress is complete and unimpeachable.... [T]he rule laid down in *Field v. Clark* governs the case before us.") (citations omitted). Plaintiff correctly notes that the Supreme Court then extended its examination to legislative journals to further support its conclusion that the legislation at issue followed the requisite procedures. Pl.'s Mem. at 16 n.7 (citing 153 U.S. at 663-68). However, the Court's consideration of legislative journals in *Lyons* must be viewed in light of the explicit adoption of the rule of *Marshall Field* holding the signatures of the presiding officers of each chambers "complete and unimpeachable." 153 U.S. at 663 (also noting that *Marshall Field* rejected state decisions that authorized a court to go behind the enrolled act to determine whether it was duly passed by the legislature). In other words, the appeal to journals in *Lyons* supplied only additional support for the holding that the legislation at issue complied with the bicameral requirement applicable to U.S. territories, and thus represented no limitation on the precedent established by *Marshall Field* and adopted in *Lyons.*

To the extent that *Lyons* raised any doubt as to the meaning of *Marshall Field,* the Supreme Court resolved that doubt two years later in *Harwood v. Wentworth,* 162 U.S. 547 (1896). The Court again considered whether legislation of a U.S. territory subject to substantially the same legislative requirement as found in Article I, Section 7 had been validly enacted. Like the factual circumstances of *Marshall Field,* it was alleged that a provision that had passed both chambers of the legislative assembly had been omitted from the enrolled bill. 162 U.S. at 548-49, 557-58. But unlike *Marshall Field,* "the case was tried by the [lower] court, upon a stipulation as to the facts," with the witness testimony consisting of the affidavits of the presiding officers of each chamber and the chief clerks of each chamber, subject only to the objection that under *Marshall Field* the enrolled bill could not be attacked by any evidence. 162 U.S. at 549-50. Despite the stipulated factual record, the Court held in *Harwood* that, under the authority of *Marshall Field,* the signatures of the presiding officers of each chamber and the governor authenticated the legislation at issue as having been enacted in the mode required by law, and thus made the attestation as to bicameral passage "unimpeachable" by any other evidence.[16] *See id.* at 557-58, 562.

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[16]Plaintiff quotes one sentence from *Harwood* out of context to characterize the decision as resting solely on the status of legislative journals as evidence, rather than a broader exclusion of evidence attacking the validity of a duly signed enrolled bill. Pl.'s Mem. at 15 (quoting *Harwood,* 162 U.S. at 562, for the proposition that the authentication was "'unimpeachable by the recitals, or omissions of recitals, in the journals of legislative proceedings'"). Plaintiff, however, fails to acknowledge the evidence recited in other portions of the opinion, as discussed above.

IV. Impact of *Munoz-Flores*

The Supreme Court's most recent discussion of the evidentiary limitations imposed by *Marshall Field* appears in *United States v. Munoz-Flores,* 495 U.S. 385 (1990), upon which plaintiff relies heavily to support its position. Plaintiff contends that *Munoz-Flores* has clarified that *Marshall Field* concerned only the limitations on the use of legislative journals as evidence and the requirements of the Journal Clause, and that the case has no applicability when a statute is challenged as violating the Constitution. Pl.'s Mem. at 17-18; Reply Mem. at 7-8, 10-11. But *Munoz-Flores* cannot be so construed without overruling *Marshall Field,* which the Supreme Court plainly has not done.

In *Munoz-Flores,* the issue presented was whether a monetary assessment required by the Victims of Crime Act of 1984 was invalid on the ground that it was a revenue bill that had originated in the Senate in violation of the Origination Clause.[17] 495 U.S. at 387. Before concluding that the challenged provision was not a revenue bill, the Court discussed whether the case involved a nonjusticiable political question, and in this context, considered whether *Marshall Field* required withholding judicial review. *Id.* at 390-92 & n.4. In a footnote, the majority expressed its disagreement with Justice Scalia's concurrence that opined that *Marshall Field* should be extended to Origination Clause challenges and, thus, preclude an independent review into the origins of a statute where an enrolled bill bears a notation (e.g., "H.J. Res." for

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[17]The Origination Clause states: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const., art. I, § 7, cl. 1

House Joint Resolution) indicating proper origination in the House:

> The only case [Justice Scalia] cites for his argument is *Marshall Field & Co. v. Clark.* That case concerned "the nature of the evidence" the Court would consider in determining whether a bill had actually passed Congress. Appellants had argued that the constitutional Clause providing that "[e]ach House shall keep a Journal of its Proceedings" implied that whether a bill had passed must be determined by an examination of the journals. The Court rejected that interpretation of the Journal Clause, holding that the Constitution left it to Congress to determine how a bill is to be authenticated as having passed. In the absence of any constitutional requirement binding Congress, we stated that "[t]he respect due to coequal and independent departments" demands that the courts accept as passed all bills authenticated in the manner provided by Congress. Where, as here, a constitutional provision *is* implicated, *Field* does not apply.

495 U.S. at 391 n.4 (emphasis in original) (citations omitted).

This passage, which is merely a footnote responding to a point in a concurring opinion, is ambiguous in some respects, but does not support plaintiff's contention that *Munoz-Flores* has clarified that *Marshall Field* bears only on the role of legislative journals as evidence or that it is inapplicable in a case alleging a violation of the Constitution. First, as defendant points out, the footnote begins by acknowledging that *Marshall Field* "concerned 'the nature of the evidence' the Court would consider *in determining whether a bill had actually passed Congress*" and then characterizes the case as "holding that the Constitution left it to Congress to determine how a bill is to be authenticated *as having passed,*" with courts required to "accept *as passed* all bills authenticated in the manner provided

by Congress." *Id.* at 391 n.4 (emphasis added). This characterization of *Marshall Field* is entirely consistent with the statement in *Marshall Field* that the signatures of the presiding officers of each chamber and the President serve as a "complete and unimpeachable" authentication that the bill has been passed by both chambers of Congress. It is true that the *Munoz-Flores* footnote focuses on legislative journals in its summary of the issue presented in *Marshall Field.* But its description of the holding is not so limited—nor would one expect it to be because, as discussed at length above, the plain language of *Marshall Field* describes evidence in addition to legislative journals.

Plaintiff attempts to characterize the last sentence of footnote 4 of *Munoz-Flores* as "establish[ing] that, when a court is presented with a claim that a law was not enacted in conformity with the Constitution, an attestation by congressional officers that a bill passed in accordance with constitutional requirements does not preclude judicial review of the underlying evidence." Pl.'s Reply Mem. at 7. The main difficulty with this contention is that it would render the rule of *Marshall Field* inapplicable even to the very facts presented in *Marshall Field.* Thus, while the last sentence of the footnote—standing alone—could be read to support plaintiff's proposition, that view is unpersuasive because it is a patently unreasonable reading of the sentence. When read in context, that sentence—"[w]here, as here, a constitutional provision *is* implicated, *Field* does not apply"—conveys two principles: first, that *Marshall Field* does not apply to Origination Clause challenges, and second, more categorically, that *Marshall Field* does not apply when the Constitution itself sets with particularity a procedure to be followed in preparing a bill for passage—*but* carving out the ultimate act of bicameral passage from the universe of procedural irregularities beyond the reach of *Marshall Field.*

Admittedly, this last distinction is not entirely satisfying, for it does not fully explain why an alleged failure of bicameral passage would be excepted from evidentiary attack when other procedural irregularities are not. But it is the only reading that is consistent with *Marshall Field,* which the Supreme Court clearly left intact. This reading is confirmed by Justice Scalia's concurrence, which reviews the holding of *Marshall Field,* making no mention of any possibility that it was overruled by the majority opinion. 495 U.S. at 408-09. His criticism was only that the majority had declined to extend the precedent of *Marshall Field* to Origination Clause cases—not that it had been overruled or narrowed. Moreover, three years later, in *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.,* 508 U.S. 439 (1993), the Supreme Court again recognized that *Marshall Field* limited the evidence a court may consider "in determining whether a bill had actually passed Congress," contrasting it with the absence of any limitations on evidence a court may consider in determining the meaning of a statute. *Id.* at 455 n.7. Indeed, the Court relied on *Munoz-Flores'* description of *Marshall Field* in drawing this distinction. *Id.*

Considering *Munoz-Flores*' discussion of *Marshall Field* in context, then, this Court finds it significant that it was primarily a response to Justice Scalia's concurrence, that it did not in any way overrule *Marshall Field,* and, indeed, that portions of it confirm the principle of *Marshall Field* as applying to cases focusing on bicameral passage. With these distinctions in mind, this Court concludes that *Munoz-Flores* does not overrule or limit the holding of *Marshall Field,* but rather only declines to extend it to Origination Clause cases.[18]

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[18]Plaintiff contends that another brief passage from *Munoz-Flores* rejects any distinction in the evidence that may

There are suggestions in *Munoz-Flores* that, if the Supreme Court were to reconsider the enrolled bill rule of *Marshall Field* today, it might reach a different result. In rejecting the government's position that the political question doctrine precluded judicial review, the Supreme Court made observations that could call into question the soundness of *Marshall Field*. For example, in response to the government's contention that the respect due to Congress weighed against judicial review (a consideration articulated in *Marshall Field*), the Court stated that "disrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible." *Munoz-Flores*, 495 U.S. at 390 (emphasis in original). The Court also emphasized the judicial "duty to review the constitutionality of congressional enactments," noting that " '[t]he alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional

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be used to establish violations of Article I, Section 7, Clause 1 (origination) and Clause 2 (bicameral and presentment requirements). *See* Pl.'s Reply Mem. at 8. The Court disagrees. The referenced sentence states only that "§ 7 gives effect to *all* of its Clauses in determining what procedures the Legislative and Executive branches must follow to enact a law." *Munoz-Flores*, 495 U.S. at 396 (emphasis in original). It is part of a larger passage that explains that a violation—once found—is remediable by the courts, in response to Justice Stevens' concurrence suggesting no remedy is available for an Origination Clause violation. *Id.* In contrast, under the enrolled bill rule of *Marshall Field*, the issue is not one of lack of remedy, but rather the evidence that may be considered to determine, in the first instance, whether there is a violation of the bicameral requirement.

responsibility.' " *Id.* at 391 (quoting *Powell v. McCormack,* 395 U.S. 486, 549 (1969)). These passages may imply some concern by some Justices about the application of *Marshall Field* to bar judicial review on political question grounds. But this Court does not have the discretion to find that a Supreme Court case has been overruled by implication. *Agostini v. Felton,* 521 U.S. 203, 237 (1997) ("'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [the lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its decisions'") (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989)); *United States Air Tour Ass'n v. FAA,* 298 F.3d 997, 1012 n.8 (D.C. Cir. 2002) (stating in response to petitioner's contention that one Supreme Court case "effectively overruled" another that "the Supreme Court has made clear that the lower courts do not have the power to make that determination"). Certainly, it is *Marshall Field,* not *Munoz-Flores,* that is directly applicable here. Moreover, for the reasons discussed above, the decision in *Munoz-Flores* does not indicate an intent to overrule or materially limit *Marshall Field,* even by implication.

V. Application of the Enrolled Bill Rule of *Marshall Field* Today

In short, *Marshall Field* establishes a rule that when a violation of the bicameral requirement is alleged, the signatures of the presiding officers of each chamber of Congress and the President on the enrolled bill is a "complete and unimpeachable" authentication that the bicameral requirement has been satisfied, unrebuttable by evidence gleaned from the Congressional Record, prior versions of bills, or any other documents printed by authority of Congress. That rule remains in effect today. Here, plaintiff concedes that the Speaker of the House and President pro tempore of the Senate signed S.1932

as enrolled and that this bill was then signed by the President of the United States. Plaintiff further concedes that the alleged variation in the bill passed by the House can be established only through evidence beyond the enrolled bill.[19] *See* Compl. ¶¶ 15-16; Pl.'s Statement of Material Facts ¶¶3-5; *see also* Def.'s Reply Br. Ex. 3 (S.1932 as enrolled and signed). These undisputed facts require dismissal of plaintiff's claim that the Deficit Reduction Act of 2005 fails to pass constitutional muster because it was not passed by the House in the same form as the Senate, under the controlling precedent of *Marshall Field.*

The application of principles dating back more than a century, and infrequently applied by federal courts recently, gives one a moment's pause. But it bears noting that the enrolled bill rule of *Marshall Field* has, in fact, been uniformly applied over the years, including in more recent times, in the context of rejecting challenges to the validity of constitutional

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[19]At the motions hearing, plaintiff appeared to retreat from its reliance on the Congressional Record (cited in its Statement of Material Facts), and contended that the alleged violation of the bicameral requirement could be proven simply by comparing the Senate engrossed bill with the enrolled bill. *See* Tr. at 10-11. The Court disagrees. Some evidence of the House vote, and the matter voted upon, would be necessary to establish that it passed the text as alleged, either from the Congressional Record, legislative journals, or otherwise. But even accepting this pared-down version of plaintiff's proffered evidence, *Marshall Field* would still require dismissal because the Senate engrossed bill cannot be considered as evidence under the enrolled bill rule; to conclude otherwise would require this Court to modify the rule drawn from *Marshall Field.*

amendments for alleged failure to conform to the ratification process. *See Leser v. Garnett,* 258 U.S. 130, 137 (1922) (holding that "the rule declared in *Field v. Clark* is applicable here," and thus rejecting challenges to the Nineteenth Amendment based on an alleged failure of states to comply with legislative procedure) (citations omitted); *Coleman v. Miller,* 307 U.S. 433, 457-58 & n.4 (1939) (Black, Roberts, Frankfurter, and Douglas, JJ., concurring) (concurring in rejection of a challenge to a state's ratification of a proposed constitutional amendment on the ground that a proclamation by Congress as to ratification by a state must be accepted under *Marshall Field,* leaving no role for the judiciary to review any ratifications); *United States v. Thomas,* 788 F.2d 1250, 1253 (7th Cir. 1986) (rejecting challenge to Sixteenth Amendment pursuant to *Marshall Field); United States v. Stahl,* 792 F.2d 1438, 1440 (9th Cir. 1986) (same); *United States v. Sitka,* 845 F.2d 43, 46-47 (2d Cir. 1988) (same); *United States v. Wojtas,* 611 F. Supp. 118, 120-21 (N.D. Ill. 1985) (same). Although the ratification context differs in some significant respects from bicameral passage, the principle has been declared to be the same. *See, e.g., Thomas,* 788 F.2d at 1253 ("Although [appellant] urges us to take the view of several state courts that only agreement on the literal text may make a legal document effective, the Supreme Court follows the 'enrolled bill rule.' If a legislative document is authenticated in regular form by the appropriate officials, the court treats that document as properly adopted. The principle is equally applicable to constitutional amendments.") (citations omitted). Moreover, the application of *Marshall Field* in a context that does not involve legislative journals further confirms that its rule is not limited to journals but rather extends more broadly to the conclusive weight to be accorded authenticated legislative documents.

The Court does not dismiss plaintiff's claim without some reservations, however. The reasons supporting the enrolled bill

rule are less forceful today, although still relevant in some respects. As plaintiff and defendant both note, state judicial decisions considering state versions of the enrolled bill rule offer valuable insights, with the cases split on its present soundness and applicability. *See generally* 1 Norman J. Singer, Sutherland Statutes and Statutory Construction § 15:2, 15:3, at 815-25 (6th ed. 2002) ("Sutherland Statutory Construction").[20] Those criticizing its soundness have observed that "[m]odern attitudes do not favor conclusive presumptions" because they "are capable of producing results which do not accord with fact." *Id.* § 15:3, at 821; *accord Ass'n of Texas Prof'l Educators v. Kirby,* 788 S.W.2d 827, 830 (Tex.1990); *D & W Auto Supply v. Dep't of Revenue,* 602 S.W.2d 420, 423-24 (Ky.1980). Thus, the present tendency favors giving the enrolled bill only a prima facie presumption of validity that may be attacked by an authoritative source of information. *See* Sutherland Statutory Construction § 15:2, at 816-18.[21]

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[20]The Court recognizes that these cases, while instructive, are of limited value because the approach taken by each state may depend on the particular wording of the state's constitution and the procedure involved. *See* Sutherland Statutory Construction § 15:2, at 818.

[21]For this reason, some states where the enrolled bill creates a conclusive presumption of procedural validity recognize a narrow exception where there is, as a practical matter, a stipulated factual record of procedural impropriety. *See Ass'n of Texas Prof'l Educators,* 788 S.W.2d. at 829-830 (recognizing an exception to the enrolled bill rule where the official legislative journals, the presiding officers of the legislature, and the attorney general concur that the enrolled bill is not the bill passed); *Consumer Party of Pennsylvania. v. Commonwealth,* 510 Pa. 158, 507 A.2d 323, 334 (1986)

Furthermore, it has been recognized that "[t]he rule disregards the primary obligation of the courts to seek the truth and to provide a remedy for a wrong committed by any branch of government."[22] *D & W Auto Supply,* 602 S.W.2d at 425. Similar principles were invoked in *Munoz-Flores* as a primary reason for declining to extend the enrolled bill rule to an Origination Clause violation. *Munoz-Flores,* 495 U.S. at 391, 396 (discussing judicial duty to review constitutionality of statutes and provide a remedy if a violation is found). On the other hand, several state courts have recently reaffirmed application of the enrolled bill rule based primarily on the rationale that, in light of the respect due to a coequal branch, the final record of enactment imports "absolute verity." *See Washington State Grange v. Locke,* 105 P.3d 9, 22-23 (2005) (en banc); *see also Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham,* 912 So.2d 204, 219-21 (Ala.2005); *Medical Soc'y of South Carolina v. Medical Univ. of South Carolina,* 513 S.E.2d 352, 356-57 (1999).

(recognizing an exception where the facts are agreed upon), *abrogated in part on other grounds, Pennsylvanians Against Gambling Expansion Fund v. Commonwealth of Pennsylvania,* 583 Pa. 275, 877 A.2d 383, 408-09 (2005). Other state courts will more broadly allow the enrolled bill to be rebutted by "clear, satisfactory, and convincing evidence" of a constitutional violation. *See e.g., D & W Auto Supply,* 602 S.W.2d at 425.

[22]In a similar vein, the convenience of avoiding numerous lawsuits and the accompanying uncertainty of the laws, also cited in *Marshall Field,* has diminished persuasive value in this era considering that "the overriding purpose of the judicial system is to discover the truth and see that justice is done." *See D & W Auto Supply,* 602 S.W.2d at 424.

It also bears noting that one of the reasons for treating the enrolled bill as conclusive evidence of bicameral passage in *Marshall Field* rested on concerns about the reliability of outside evidence. However, such reliability concerns are alleviated, at least in part, by the ability of modern technology (for example, recording devices and computers) accurately to transcribe proceedings and make them readily accessible. *See D & W Auto Supply,* 602 S.W.2d at 424. Of course, even modern technology does not eliminate the problem of typographical and clerical errors, or mistakes arising from misunderstandings and hastily conducted business. These latter types of errors were of concern in *Marshall Field* and subsequent cases. *See* 143 U.S. at 674 (expressing concern over reliance on "loose and hasty memoranda made in the pressure of business and amid the distractions of a numerous assembly"); *Harwood,* 162 U.S. at 561-62 (expressing concern over reliance on endorsements made upon a bill that were not readily understandable, although made formally by the chief clerks).

At first glance, concerns over reliability and difficulties of interpretation would not appear to weigh heavily in the present case, because the proffered evidence—the votes of the House and Senate reported in the Congressional Record, the Senate engrossed bill, and a comparison of that bill to the enrolled bill signed by the President—consists of official documents authorized by Congress that are generally regarded as reliable. *See* Pl.'s Statement of Material Facts ¶¶ 2-5. For example, the Congressional Record is a government publication used as a source of legislative history by courts in other contexts.[23] *See*

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[23]The use of legislative history by courts, for example, to determine the meaning of a statute does not signal any weakening of *Marshall Field.* The Supreme Court has

Gregg v. Barrett, 771 F.2d 539, 541 (D.C. Cir. 1985) (describing relationship of Congressional Record to Congress). But a close reading of the Congressional Record excerpts proffered by plaintiff reveals that the proceedings are not wholly free from ambiguity. Defendant has responded to plaintiff's evidence with a colorable claim that it shows that the House, in fact, voted to pass S.1932 in the same form that the Senate passed it, in contrast to S.1932 as engrossed with the alleged error in section 5001(a)(1).[24] Def.'s Mem. at 15-17. This interpretation of the evidence has some credibility problems, given what has been reported by other sources about the circumstances of passage of the DRA, but if one puts aside the newspaper articles and testimonial letters and statements from members of Congress—which plaintiff now concedes are not competent evidence—and instead examines only the House vote reported in the Congressional Record, it is, in fact, difficult to discern with confidence which version of S.1932 was the subject of the House vote. *See* 152 Cong. Rec. H68-69 (Feb. 1, 2006).

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recognized that the limitation on evidence established by *Marshall Field* does not apply to a court's determination of the meaning of a statute. *See United States Nat'l Bank of Oregon,* 508 U.S. at 455 n.7. Indeed, *Marshall Field* itself acknowledged that, where there is "no question ... as to the existence or terms of a statute," legislative history may be used to discern its requirements. *See* 143 U.S. at 678-79 (citing *Gardner v. Barney,* 73 U.S. 499, 511 (1867)).

[24]This view is based on the report that the House voted to adopt House Resolution 653, which in turn states that "the House hereby concurs in the Senate amendment to the House amendment to the bill (S.1932) to provide for reconciliation ..." 152 Cong. Rec. H37 (Feb. 1, 2006).

In rebuttal, plaintiff has proffered testimonial evidence in the form of a letter from the Clerk of the House describing the House as having passed the Senate engrossed bill with the erroneous 36-month limitation in section 5001(a)(1)—the very sort of testimonial evidence that the Supreme Court squarely rejected as improper and unreliable in *Harwood. See* Pl.s Reply Mem., Ex. E. Recognizing the perils involved in submitting such evidence, plaintiff also disclaims the need to rely on the Clerk's letter, arguing that, under 1 U.S.C. § 106, the Senate engrossed bill is the only bill upon which the House is legally authorized to vote. *See* Pl.'s Reply Mem. at 3; Tr. at 2-3, 13-14 (relying on 1 U.S.C. § 106 provision requiring that, following passage, an engrossed bill "shall be sent to the other House, *and in that form shall be dealt with by that House and its officers*") (emphasis added). Plaintiff contends that, in light of 1 U.S.C. § 106, the evidence may not be construed in any other manner, regardless of whether any House members subjectively believed their votes to be on S.1932 as actually passed by the Senate.

Thus, a more fulsome view of the evidence proffered is instructive in two respects: first, that some of the same concerns underlying the enrolled bill rule—reliability and misinterpretation of extrinsic evidence—remain valid today; and second, that to overcome those concerns, the Court would need to grant a conclusive presumption to the engrossed bill, replacing the "enrolled bill rule" as a practical matter with an "engrossed bill rule." But as defendant points out (*see* Def.'s Reply Mem. at 17-18), the reasons for adopting an engrossed bill rule are, in principle, no different than those for the enrolled bill rule, consisting in the main of the need for certainty in determining what the chambers of Congress have voted upon. As plaintiff's counsel stated at the motions hearing in urging adoption of a conclusive presumption in favor of the engrossed bill, "the reason it's not appropriate in the judicial

system [—referring to looking at the intentions of members of Congress—] is because [of] the rules and there's a lot of formality in the legislative system particularly in the House and they serve a purpose and it's not just ... archaic and stately because without those procedures then you never actually know what legislation has been passed." Tr. at 53. But that very same uncertainty is one of the primary reasons set forth in *Marshall Field* for the enrolled bill rule. The Supreme Court responded to such concerns about uncertainty by applying a conclusive presumption in favor of the enrolled bill authenticated by the presiding officers of each chamber and the President—not the engrossed bill prepared by a chief clerk—to establish the bill that each chamber has passed. The presumption is consistent with, rather than at odds with, 1 U.S.C. § 106, which, in charting the procedures governing passage of a bill, also provides that "[w]hen such bill ... shall have passed both Houses, it ... shall be signed by the presiding officers of both Houses and sent to the President of the United States." *See United States Nat'l Bank of Oregon*, 508 U.S. at 455 n.7 (citing 1 U.S.C. § 106 as consistent with *Marshall Field*).

With these current observations of the enrolled bill rule in mind, the upshot is that, although in some respects outdated, there is no compelling reason to conclude that through the passage of time *Marshall Field* has turned into an anomaly that should have no applicability today—either broadly or on the facts of this case. Given that *Marshall Field* has not to date been overruled or materially limited by the Supreme Court, this Court does not, in any event, have the discretion to so hold. *See Agostini*, 521 U.S. at 238. Hence, applying the enrolled bill rule of *Marshall Field* here, the Court concludes that plaintiff's challenge to the DRA must fail.

CONCLUSION

For the foregoing reasons, the Court will grant defendant's motion to dismiss and deny plaintiff's motion for summary judgment. A separate order will be issued herewith.

/s/
JOHN D. BATES
United States District Court

DATE: August 11, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN,
Plaintiff,

v. Civil Action No. 06-0523 (JDB)

CLERK, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,
Defendant.

ORDER

Upon consideration of [4] plaintiff's motion for summary judgment, [6] defendant's motion to dismiss, and [7] the brief of amicus CTIA - The Wireless Association, and the entire record herein, and for the reasons stated in the Memorandum Opinion issued on this date, it is hereby

ORDERED that plaintiff's motion for summary judgment is **DENIED**; and it is further

ORDERED that defendant's motion to dismiss is **GRANTED**.

/s/
JOHN D. BATES
United States District Court

DATE: August 11, 2006

Excerpt from the Deficit Reduction Act of 2005
Public Law No. 109-171

SEC. 5101. BENEFICIARY OWNERSHIP OF CERTAIN DURABLE MEDICAL EQUIPMENT (DME).

(a) DME.--

(1) IN GENERAL.--Section 1834(a)(7)(A) of the Social Security Act (42 U.S.C. 1395m(a)(7)(A)) is amended to read as follows:

"(A) PAYMENT.--In the case of an item of durable medical equipment not described in paragraphs (2) through (6), the following rules shall apply:

"(i) RENTAL.--

"(I) IN GENERAL.--Except as provided in clause (iii), payment for the item shall be made on a monthly basis for the rental of the item during the period of medical need (but payments under this clause may not extend over a period of continuous use (as determined by the Secretary) of longer than 13 months).

"(II) PAYMENT AMOUNT.--Subject to subparagraph (B), the amount recognized for the item, for each of the first 3 months of such period, is 10 percent of the purchase price recognized under paragraph (8) with respect to the item, and, for each of the remaining months of such period, is 7.5 percent of such purchase price.

"(ii) OWNERSHIP AFTER RENTAL.--On the first day that begins after the 13th continuous month during which payment is made for the rental of an item under clause (i), the supplier of the item shall transfer title to the item to the individual.

. . . .

No. 07-141

In the Supreme Court of the United States

PUBLIC CITIZEN, PETITIONER

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, when an enrolled bill has been signed by the presiding officers of both Houses of Congress and by the President of the United States, its authentication as a bill that passed Congress is "complete and unimpeachable." *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 672 (1892).

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In the Supreme Court of the United States

No. 07-141

PUBLIC CITIZEN, PETITIONER

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 486 F.3d 1342. The opinion of the district court (Pet. App. 25a-63a) is reported at 451 F. Supp. 2d 109.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2007. The petition for a writ of certiorari was filed on August 6, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner alleges that the Deficit Reduction Act of 2005 (DRA or Act), Pub. L. No. 109-171, 120 Stat. 4, did not pass both chambers of Congress in identical form

and that its enactment thus did not comport with the bicameral-passage requirement of Article I, Section 7 of the Constitution. The district court dismissed petitioner's complaint and the court of appeals affirmed.

1. To become a law, a bill must be passed by both the House and the Senate, and must be signed by the President. U.S. Const. Art. I, § 7, Cl. 2. Congress has specified procedures for the enactment of legislation. 1 U.S.C. 106. "Every bill or joint resolution in each House of Congress shall, when such bill or resolution passes either House, be printed, and such printed copy shall be called the engrossed bill or resolution as the case may be." *Ibid.* "Said engrossed bill or resolution shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and in that form shall be dealt with by that House and its officers, and, if passed, returned signed by said Clerk or Secretary." *Ibid.* "When such bill, or joint resolution shall have passed both Houses, it shall be printed and shall then be called the enrolled bill, or joint resolution, as the case may be, and shall be signed by the presiding officers of both Houses and sent to the President of the United States." *Ibid.*

2. Petitioner alleges that the enactment of the Deficit Reduction Act in the fall of 2005 did not comport with the bicameral-passage requirement of Article I, Section 7 of the Constitution. Pet. App. 2a. The DRA has ten titles addressing a wide array of subjects. See 120 Stat. 4. It amended a variety of statutes, including the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, and the Social Security Act, 42 U.S.C. 301 *et seq.* Pet. App. 4a. Among other things, it made extensive changes to the Medicaid and Medicare laws, provided relief for vic-

tims of Hurricane Katrina, created a program through which households may obtain coupons to defray the cost of digital-to-analog converter boxes for their televisions, and increased by $100 the fee for filing a civil action in a federal district court. *Ibid.* Petitioner alleges that it was injured by the Act's increase in the filing fee for civil actions. *Ibid.*

According to the facts alleged in the complaint—which have not been admitted—the House and Senate passed different versions of a budget bill referred to as S. 1932, 105th Cong., 1st Sess. (2005). Pet. App. 5a. The legislation was sent to a conference committee, which produced a conference report that failed to pass the Senate. *Ibid.* The Senate then passed an amended version of S. 1932. *Ibid.* In the process of engrossing the bill, a Senate clerk allegedly made an error affecting a provision that authorizes Medicare reimbursement for the rental of certain durable medical equipment, changing the number of months for which reimbursement was available from 13 to 36. *Ibid.* The House of Representatives then allegedly voted on the engrossed bill, including the erroneous duration figure, before returning the bill to the Senate for enrollment. *Ibid.* The Senate clerk allegedly recognized the transcription error in the engrossed bill and included the 13-month figure in the enrolled bill. *Ibid.*

There is no dispute that the "enrolled" version of the DRA was signed by the Speaker of the House of Representatives and the President pro tempore of the Senate, transmitted to the President, and signed by the President. Pet. App. 5a, 15a.

3. The district court dismissed petitioner's complaint, holding that even if the allegations of the complaint are true, petitioner's claim is foreclosed by *Mar-*

shall Field & Co. v. *Clark*, 143 U.S. 649 (1892). Pet. App. 25a-63a. The court explained that "the 'enrolled bill rule' of *Marshall Field* requires the Court to accept the signatures of the Speaker of the House and President pro tempore of the Senate on the enrolled bill as 'complete and unimpeachable' evidence that the bill has been passed by both chambers of Congress." *Id.* at 38a.

4. The court of appeals affirmed. Pet. App. 1a-24a. It explained that *Marshall Field* "crafted a clear rule: '[I]t is not competent for [a party raising a bicameralism challenge] to show, from the journals of either house, from the reports of committees or from other documents printed by authority of Congress, that [an] enrolled bill' differs from that actually passed by Congress." *Id.* at 14a (quoting *Marshall Field*, 143 U.S. at 680). Instead, the court of appeals explained, "[t]he only 'evidence upon which a court may act when the issue is made as to whether a bill . . . asserted to have become a law, was or was not passed by Congress' is an enrolled act attested to by declaration of 'the two houses, through their presiding officers.'" *Ibid.* (quoting *Marshall Field*, 143 U.S. at 670, 672). "An enrolled bill, 'thus attested,' 'is conclusive evidence that it was passed by Congress.'" *Ibid.* (quoting *Marshall Field*, 143 U.S. at 672-673).

The court of appeals explained that *Marshall Field* rested its conclusion upon two rationales, both of which remain relevant today. Pet. App. 13a. First, the court explained that it would be "[b]etter, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act . . . should at any and all times be liable to be put in issue and impeached. . . . Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable." *Id.* at 14a (quoting *Marshall*

Field, 143 U.S. at 675). Second, *Marshall Field* "based its holding on separation of powers concerns, citing 'the respect due to a coordinate branch of the government.'" *Ibid.* (quoting *Marshall Field*, 143 U.S. at 673).

The court of appeals "easily reject[ed]" petitioner's contention that *Marshall Field* restricted the use of only one type of evidence—the journals kept by Congress pursuant to the Journal Clause of the Constitution (Art. I, § 5, Cl. 3)—and allowed other forms of evidence to be used to impeach an authenticated enrolled bill. Pet. App. 15a-16a. The court explained that *Marshall Field* "first held that 'the enrollment itself is the record, which is conclusive as to what the statute is,'" and then "confirmed that 'it is not competent for the appellants to show, from the journals of either house, from the reports of committees *or from other documents printed by authority of Congress*, that the enrolled bill . . . as finally passed, contained a section that does not appear in the enrolled act.'" *Id.* at 16a (emphasis added) (quoting *Marshall Field*, 143 U.S. at 675, 680).

The court of appeals also rejected the contention that an "oblique footnote" in *United States* v. *Munoz-Flores*, 495 U.S. 385 (1990), overturned or modified the enrolled bill rule of *Marshall Field*. Pet. App. 18a. The court observed that *Munoz-Flores* "did not in any way involve the question raised in *Marshall Field*, *i.e.*, whether an authenticated enrolled bill had passed Congress." *Id.* at 21a. "The question instead was whether a provision that unquestionably had passed Congress constituted a bill for raising revenue," and, the court concluded, *Munoz-Flores* "is clear on one point: the Court did not mean to overturn or modify the enrolled bill rule of *Marshall Field*." *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioner's claim is foreclosed by the enrolled bill rule of *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892). The other court of appeals, and all five district courts, that have addressed the issue with respect to the Deficit Reduction Act of 2005 have unanimously reached the same conclusion. See *OneSimpleLoan* v. *United States Sec'y of Educ.*, 496 F.3d 197 (2d Cir. 2007), petition for cert. pending, No. 07-492 (filed Oct. 10, 2007); *Zeigler* v. *Gonzales*, No. 06-0080-CG-M, 2007 WL 1875945 (S.D. Ala. June 28, 2007); *Conyers* v. *Bush*, No. 06-11972, 2006 WL 3834224 (E.D. Mich. Nov. 6, 2006); Pet. App. 25a-63a; *California Dep't of Soc. Servs.* v. *Leavitt*, 444 F. Supp. 2d 1088 (E.D. Cal. 2006); *OneSimpleLoan* v. *United States Sec'y of Educ.*, No. 06 Civ. 2979, 2006 WL 1596768 (S.D.N.Y. June 9, 2006), aff'd, 496 F.3d 197 (2d Cir. 2007), petition for cert. pending, No. 07-492 (filed Oct. 10, 2007). Although petitioner urges this Court to overrule its century-old precedent, the vital public policy and separation of powers concerns that animated *Marshall Field* are as powerful today as when *Marshall Field* was decided. The petition should be denied.[1]

1. Petitioner concedes (Pet. 7) that the enrolled bill was signed by the presiding officers of the Senate and the House of Representatives before transmittal to the President. Under *Marshall Field*, that concession resolves the inquiry: petitioner may not seek to prove,

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[1] The court of appeals did not reach the government's argument that petitioner lacks standing. Pet. App. 7a-12a. Because the enrolled bill rule is a non-merits threshold rule designed to preclude judicial inquiry, this Court, like the court of appeals, can consider it without addressing petitioner's standing. See, *e.g.*, *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191-1193 (2007); Pet. App. 10a-12a.

through extrinsic evidence, that the enrolled bill was not, in fact, identical to the bill passed by both chambers.

In *Marshall Field*, several importers challenged duties that had been assessed under the Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567. The importers argued that the act omitted a provision that had been passed by Congress, and that it therefore was not a valid law. *Marshall Field*, 143 U.S. at 662-669.

This Court observed that "[t]here is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, nor in the president to approve * * * any bill not passed by Congress." *Marshall Field*, 143 U.S. at 669. The Court stressed, however, that the question before it was "the nature of the evidence upon which a court may act when the issue is made as to whether a bill, originating in the House of Representatives or the Senate, and asserted to have become a law, was or was not passed by Congress." *Id.* at 670. The Court held that principles of interbranch comity require the Judicial Branch to accept the signatures of the presiding officers of Congress and the President of the United States on the enrolled bill as "complete and unimpeachable" evidence that the bill passed Congress. *Id.* at 672.

The *Marshall Field* Court explained that "[t]he signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress." 143 U.S. at 672. Such a bill "carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Con-

gress." *Ibid.* Accordingly, "[t]he respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated." *Ibid.*

This Court emphasized "the consequences that must result if this court should feel obliged, in fidelity to the Constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been authenticated by the signatures of the presiding officers of the two houses of Congress, and by the approval of the President, and been deposited in the public archives, *as an act of Congress*, was not in fact passed by the House of Representatives and the Senate, and therefore did not become a law." *Marshall Field*, 143 U.S. at 670. "Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act * * * should at any and all times be liable to be put in issue and impeached by the journals, loose papers of the legislature and parole evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable." *Id.* at 675 (quoting *Sherman* v. *Story*, 30 Cal. 253, 275 (1866)).

2. Petitioner contends (Pet. 12-16) that *Marshall Field* restricts the use of only one form of evidence—the journals kept by Congress pursuant to the Journals Clause—and allows the impeachment of an authenticated enrolled bill through other forms of extrinsic evidence, such as an engrossed bill. As the court of appeals explained, however, "[n]othing in the *Marshall Field* opinion purports to limit application of the enrolled bill rule to journal-based challenges." Pet. App. 16a. The *Marshall Field* Court held broadly that the signatures

of the presiding officers of Congress and the President on an enrolled bill are "complete and unimpeachable" evidence that the bill passed Congress. 143 U.S. at 672. And in *Marshall Field* itself, the plaintiffs relied not only on congressional journals, but also on "reports of committees of each house, reports of committees of conference, and other papers printed by authority of Congress." *Id.* at 669.

Indeed, it would make "little sense" to exclude "the legislative journals that the Constitution requires, but leav[e] the door open to the use of documents of some lesser stature under the law—that would elevate other evidence over evidence that the Constitution requires Congress to maintain." Pet. App. 44a. Moreover, as the court of appeals explained, "neither of the [*Marshall Field*] Court's rationales applies solely to impeachment by journals." *Id.* at 16a. "No less 'uncertainty in the statute laws' upon which 'depend public and private interests of vast magnitude,' would result from allowing collateral attack of the enrolled bill by congressional documents other than journals." *Ibid.* (citation omitted). "And 'the spectacle of examination of journals by [the courts]' no more 'subordinates the legislature' * * * than does inspection of other materials." *Ibid.* (citation omitted).

3. Petitioner essentially contends (Pet. 16-19) that a footnote in *United States* v. *Munoz-Flores*, 495 U.S. 385 (1990), cabined *Marshall Field* to such an extent that *Marshall Field* no longer applies to bicameralism challenges (such as the bicameralism challenge in *Marshall Field* itself). That is incorrect.

Munoz-Flores did not involve the question whether a bill had passed both Houses of Congress. Rather, the question was whether a provision that unquestionably

had passed Congress was a bill for raising revenue. *Munoz-Flores*, 495 U.S. at 387-388. If so, the Constitution required that the provision originate in the House of Representatives. U.S. Const. Art. I, § 7, Cl. 1. The Court found "consideration of [the] origination question 'unnecessary'" because it determined that the challenged bill "was not one for raising revenue." *Munoz-Flores*, 495 U.S. at 401 (quoting *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 203 (1897)).

In a footnote, the Court also rejected the contention that the Origination Clause question was non-justiciable under *Marshall Field*. *Munoz-Flores*, 495 U.S. at 391 n.4. In doing so, the Court stated that *Marshall Field* is inapplicable "[w]here * * * a constitutional provision *is* implicated." *Id.* at 392 n.4. While the precise meaning of that sentence is unclear, the court of appeals correctly explained that "the footnote is clear on one point: the Court did not mean to overturn or modify the enrolled bill rule of *Marshall Field*." Pet. App. 21a. Rather, the footnote in *Munoz-Flores* correctly explained that *Marshall Field* "concerned 'the nature of the evidence' the Court would consider in determining whether a bill had actually passed Congress," and that "'[t]he respect due to coequal and independent departments' demands that the courts accept as passed all bills authenticated in the manner provided by Congress." 495 U.S. at 391-392 n.4 (quoting *Marshall Field*, 143 U.S. at 670, 672). Thus, "[w]hatever plausible alternative interpretations may be supported by the language of the 'oblique footnote,' [petitioner's] reading is not one of them." *OneSimpleLoan*, 496 F.3d at 207.

Three years after *Munoz-Flores*, this Court confirmed that the *Marshall Field* doctrine concerns "'the nature of the evidence' the Court [may] consider in de-

termining whether a bill had actually passed Congress," and that, under *Marshall Field*, "a law consists of the 'enrolled bill,' signed in open session by the Speaker of the House of Representatives and the President of the Senate." *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 n.7 (1993) (quoting *Munoz-Flores*, 495 U.S. at 391 n.4, and *Marshall Field*, 143 U.S. at 672). That is fatal to petitioner's contention that *Marshall Field* no longer stands for that proposition.

4. Petitioner (Pet. 19) eventually gets to the heart of the matter by arguing that *Marshall Field* should be overruled. In petitioner's view (Pet. 19), the "concerns behind that decision * * * are of far less significance today."

a. Circumstances have not, however, changed meaningfully. Now as when *Marshall Field* was decided, clerical errors may occur, but the task of comparing and reconciling the bills passed by each House must be done by Congress itself in the process of enrolling a bill, before presenting it to the President. Once that process is complete, the public is entitled to rely on the attestations of the presiding officers of Congress and the President as unimpeachable assurance that the measure was duly enacted.[2]

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[2] Although petitioner's argument (Pet. 19) rests on "advances in technology," its complaint is premised on the notion that "engrossed bills printed today are subject to error or mishandling." *OneSimpleLoan*, 496 F.3d at 208. "Indeed, such advances may provide new ways to alter a bill's text during the legislative process." *Ibid.* As the House Parliamentarian has explained, the engrossing process can be a "detailed and complicated process" requiring the synthesis of a large number of amendments. Charles W. Johnson, U.S. House of Representatives, *How Our Laws Are Made*, H.R. Doc. No. 93, 108th Cong., 1st Sess. 37 (2003).

The reliance interests on this bill alone—not to mention the thousands of bills enacted since this Court decided *Marshall Field* 115 years ago—are enormous. The DRA has ten titles addressing a wide array of subjects. See 120 Stat. 4. Among other things, it made extensive changes to the Medicaid and Medicare laws, provided relief for victims of Hurricane Katrina, and created a program through which households may obtain coupons to defray the cost of digital-to-analog converter boxes for their televisions. Pet. App. 4a. As the court of appeals explained, "[o]ne need only look to the breadth of the DRA to understand the 'vast magnitude' of 'public and private interests' which depend upon the certainty of statutes." *Id.* at 23a-24a (quoting *Marshall Field*, 143 U.S. at 670).

Nor have the separation-of-powers concerns underlying *Marshall Field* diminished over time. "[T]oday, no less than in 1892, the spectacle of courts directing legislative authentication procedures and otherwise meddling in the inner workings of Congress 'disregards that coequal position . . . of the three [branches] of government.'" Pet. App. 23a-24a (quoting *Marshall Field*, 143 U.S. at 676).

b. Although petitioner (at 19) invokes 1 U.S.C. 106, which was enacted in 1893, that statute codifies the very authentication procedure on which *Marshall Field* was based. It provides for the enrolled bill to be signed by the presiding officers of both Houses before transmittal to the President. See 1 U.S.C. 106; *United States Nat'l Bank*, 508 U.S. at 455 n.7 (noting that in *Marshall Field*, "the Court stated that a law consists of the 'enrolled bill,' signed in open session by the Speaker of the House of Representatives and the President of the Senate, *see*

also 1 U.S.C. § 106") (emphasis added) (quoting *Marshall Field*, 143 U.S. at 672).

Indeed, as the district court observed, petitioner's own arguments underscore the continuing need for the enrolled bill rule. Pet. App. 59a-62a. Although petitioner insists (Pet. 5-6) that the House of Representatives voted on an engrossed bill that included a clerical error, the *Congressional Record* excerpts on which petitioner relies indicate only that the House voted on H.R. Res. 653. The *Congressional Record* does not specify that H.R. Res. 653 is the engrossed bill that petitioner presumes it to be. See Pet. App. 60a & n.24; Gov't C.A. Br. 26-28. While the House should have voted on the engrossed bill, see 1 U.S.C. 106, the whole point of petitioner's case is that Congress allegedly failed to follow required procedures.

As a result, petitioner is essentially asking this Court to "replac[e] the 'enrolled bill rule' as a practical matter with an 'engrossed bill rule.'" Pet. App. 61a. An enrolled bill, however, has weightier indicia of accuracy than an engrossed bill, because it is signed by the presiding officer of each House of Congress, as opposed to a clerk. See 1 U.S.C. 106. In any event, there is little sense in overruling a century-old precedent in order to replace the enrolled bill rule with an engrossed bill rule.

5. Finally, while the overruling of *Marshall Field* would be extremely unsettling, it is not clear how often this issue arises. With *Marshall Field* in place, the issue appears to have recurred only rarely, which provides another reason for not overruling such a well-settled precedent. If *Marshall Field* were overruled, however, litigants would have a strong incentive to scour the *Congressional Record* for evidence of previously unnoticed clerical errors. If few such errors were found, that

would underscore the absence of a compelling reason to grant review in order to consider overruling *Marshall Field*. If numerous such errors were found, that would underscore the enormous reliance interests that the *Marshall Field* rule protects. Either way, *Marshall Field* should not be overruled.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2007

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No. 07-141

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PUBLIC CITIZEN,
Petitioner,

v.

CLERK, U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the D.C. Circuit

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The government does not dispute that the text of S. 1932 as engrossed in the Senate and transmitted to the House for consideration differed substantively from the version of S. 1932 transmitted to the President for his signature. The government also does not dispute that, in accordance with statutory and House procedures, the only Senate bill on which the House can vote is an engrossed bill. And the government concedes that, if the House did not vote on the version of S. 1932 that was signed by the President, that bill would not have been constitutionally enacted. The government nonetheless argues that certiorari should be denied, primarily for three reasons.

1. First, relying on *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), the government argues that this Court cannot look at the indisputable evidence at all. In making this argument, the government quotes selectively from *Marshall Field*, but pays little attention to the context of the case or, in particular, the evidence on which the *Marshall Field* plaintiffs focused. In *Marshall Field*, the plaintiffs had argued that journals offered the "best, if not conclusive, evidence" of the content of bills. *Id.* at 672. In fact, the "clause of the constitution upon which the [plaintiffs] rest[ed] their contention that the act in question was never passed by congress" was the Journal Clause. *Id.* at 670. Yet there is no requirement that the text of a bill be set forth in the journals. The fact that the Constitution's journal requirement is not tied to the requirements for the passage of legislation was thus fatal to the plaintiffs' claim that the content of the journals proved the defect in the statute. *See United States v. Munoz-Flores*, 495 U.S. 385, 391 n.4 (1990) (explaining that *Marshall Field* rejected the argument that "whether a bill had passed must be determined by an examination of the journals"). By contrast, the evidence at issue here is the engrossed and enrolled bills created and printed pursuant to 1 U.S.C. § 106, which establishes procedures for enacting legislation—precisely the connection between the evidence and the legislative process that was absent in *Marshall Field*.

The government argues that, if the journals that the Constitution requires to be kept cannot be used to impeach an enrolled bill, then nothing can. That argument shows a lack of understanding about the journal requirement. As *Marshall Field* explains, the Constitution's requirement for the keeping of journals is unrelated to its requirements for passing legislation. 143 U.S. at 671. The Constitution does not even require that journals include the text of bills. *Id.* For this reason, journals are not appropriate evidence to prove the content of bills. In contrast, an engrossed bill is not simply tied to the enactment of legislation—it *is* the legislation.

The government points out that the *Marshall Field* plaintiffs presented exhibits in addition to the journals. *See also* Pet. 15 n.6. However, the opinion in *Marshall Field* makes clear that the plaintiffs' ability to prove their case turned on their argument about the significance of journal entries. The plaintiffs' claim was that a section that was included in the conference report passed by both Houses was omitted from the enrolled bill. The conference report was printed in the journals, which were offered as evidence of the report. *See, e.g.*, Reply Br. of Appellants in *Marshall Field*, No. 1052, at 50-51 (making this point and directing the Court to an appendix to the government's brief, which reproduced relevant journal entries). As the Court explained, the plaintiffs "assumed in argument that the object of [the Journal] clause was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by the two houses of congress." 143 U.S. at 670; *see id.* ("The clause of the constitution upon which [plaintiffs] rest their contention that the act in question was never passed by congress is the one declaring that 'each house shall keep a journal of its proceedings . . . .'"). For this reason, it is not surprising that the journals are the only evidence discussed in the Court's opinion.

The government's argument gives short shrift to the Supreme Court's much more recent description of *Marshall*

Field. In its 1990 decision in *Munoz-Flores*, the Court explained that, under *Marshall Field*, courts cannot rely on the content of legislative journals to determine whether a law was constitutionally enacted because the duty to keep a journal does not bind Congress with respect to the enactment of laws. However, where a case concerns a constitutional requirement binding Congress with respect to the enactment of laws, "[*Marshall*] *Field* does not apply." 495 U.S. at 391 n.4.

Declining to posit an alternative reading of *Munoz-Flores*, the government rests on its view that petitioner's reading is incorrect. The government then contends that the Court "confirmed" a broad reading of *Marshall Field* in a later case, *United States National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439 (1993). As discussed in the petition (at 18 n.7), *National Bank of Oregon* did not involve or even discuss an "enrolled bill rule" and cited *Marshall Field* for an uncontroversial point. 508 U.S. at 455 n.7.

2. Second, the government suggests that the facts in this case are subject to dispute. There is, of course, no contesting that the engrossed bill presented in the House and the enrolled bill signed by the President were substantively different. Nonetheless, the government suggests that perhaps the House did not vote on the bill before it. It offers no theory, however, as to what else the House might have been voting on, and it acknowledges (at 13) that the only Senate bill on which the House can vote is an engrossed Senate bill. *See* 1 U.S.C. § 106; 7 *Deschler's Precedents of the U.S. House of Reps.* (House Doc. No. 94-661), ch. 24, § 12 at 4889, § 3343 at 805, *available at* http://origin.www.gpoaccess.gov/precedents/deschler/browse.html. The engrossed Senate bill was the only version of S.1932 before the House on February 8, 2006. The government's contention that the facts are open to dispute is not credible and provides no reason for denying review.

3. Finally, the government argues that an "enrolled bill rule" establishing an irrebuttable presumption that bills sent by

Congress to the President were passed in accordance with constitutional requirements is good policy. Policy arguments, however, cannot override article I, section 7, clause 2's bicameralism requirement. In any event, the certainty and stability that the government seeks are best achieved through rigorous enforcement of the Constitution's requirements for enacting legislation, not by overlooking those requirements when the Executive or Legislative Branch finds it convenient to do so.

The government argues that, on the one hand, if few bicameralism violations occur, this constitutional provision need not be enforceable. The notion that the Court should turn a blind eye to constitutional violations as long as Congress and the Executive Branch do not abuse their "right" to commit them is repugnant to our system of government and the rule of law.

On the other hand, the government states that, if bicameralism violations are frequent, then the "reliance interest" in being able to assume the validity of enacted legislation should override the public interest in legislation being constitutionally enacted. This statement also shows striking disregard for a fundamental constitutional requirement. Although petitioner agrees that both the public and the government need certainty with respect to the status of enacted legislation, that interest is best served by enforcing procedures intended to assure compliance with the bicameralism requirement and by speedy resolution of the constitutional question when it arises, not by side-stepping the question altogether.

Unfortunately, the decisions in the cases challenging the Deficit Reduction Act seem already to have emboldened some lawmakers to manipulate the legislative process to circumvent the "unenforceable" bicameralism requirement. *See* E. Bolstad, *Young Accused of Changing Bill After Vote*, Anchorage Daily News, Aug. 10, 2007, *available at* www.adn.com/news/alaska/story/9208373p-9124529c.html (after bill's passage, lawmaker or his staff changed earmark for general road-widening project to one that benefitted a specific interchange opposed by many

local officials but desired by developer with ties to frequent contributor to lawmaker). The official documents printed pursuant to 1 U.S.C. § 106 allow such situations to be identified with certainty, yet without this Court's intervention, "laws" that were demonstrably not validly enacted will remain in force.

If the Court rules that a bicameralism violation cannot be tolerated, the number of such violations will likely be fewer than otherwise. Congress and the President can be expected to correct such errors in the future, before purporting to enact the bill into law. Procedures for making such corrections already exist. *See* 109th House Rules and Manual, House Doc. No. 108-241, § 565 at 296-97 (2005), *available at* www.gpoaccess.gov/hrm/browse_109.html. They simply were not used here.

Thus, petitioner agrees with the government that it should be left to Congress to determine in the first instance what bills have passed its chambers. The "enrolled bill rule" does not do so, however. Rather, it allows individual members of Congress or a congressional clerk to thwart Congress's will, which under the Constitution is expressed through the votes of each chamber on the legislation before it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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